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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

NORTHERN TELECOM INC.,
a Delaware corporation,

Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.*
THEODORE R. ANDERSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the False Claims Amendments Act of 1986, Congress expanded the penalties and damages available under the Act and lowered the burden of proof and scienter requirements. It also revised the Act's government knowledge bar rule, which previously conferred on defendants an absolute defense against a *qui tam* suit brought under the Act by a private relator where the suit was based on information the government already possessed. The 1986 Amendments are completely silent as to whether they are to be applied retroactively, and the Amendments do not contain a severability clause or any other indicia of Congress's intent to treat some provisions of the Amendments differently than others for purposes of retroactivity.

The questions presented in this case are:

1. When a court applies the retroactivity analysis mandated by *Landgraf v. USI Film Products* to a statute that does not contain a severability clause or other indicia of severability, should the court presume that the statute is one indivisible unit for retroactivity purposes?

2. Whether a statute, although jurisdictional in form, that alters pre-existing substantive rights can be applied retroactively absent an express direction from Congress that it be applied retroactively?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to this proceeding are Theodore R. Anderson, who is the relator and *qui tam* plaintiff, and Northern Telecom Inc.,[1] the defendant.

The United States of America did not intervene in the proceedings below and is not a party to this case.

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[1] Petitioner Northern Telecom Inc.'s parent corporation is Northern Telecom Limited - Northern Telecom Limitee, a Canadian corporation. Northern Telecom Inc.'s subsidiaries are wholly owned.

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October Term, 1995

NORTHERN TELECOM INC.,
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UNITED STATES OF AMERICA *ex rel.*
THEODORE R. ANDERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Northern Telecom Inc. ("Northern"), respectfully prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit which was entered in this case on May 25, 1995.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 52 F.3d 810 and is reprinted in App. A, at 1a.

The opinion of the United States District Court for the Western District of Washington is not reported and is reprinted in App. B, at 14a.

JURISDICTION

The Ninth Circuit rendered its opinion on April 20, 1995. App. A, at 1a. Northern filed a timely petition for rehearing and suggestion of rehearing en banc on May 4, 1995. The Ninth Circuit filed an amended opinion, *sua sponte*, on May 25, 1995. It denied Northern's petition for rehearing on June 22, 1995. App. C, at 31a.

Relator Anderson filed an untimely petition for rehearing on or about July 10, 1995, and then filed a motion to recall the mandate and a motion for leave to file a petition for rehearing on July 21, 1995. The Ninth Circuit denied Anderson's untimely petition for rehearing in an Order entered on July 26, 1995. App. D, at 33a.

This Court has jurisdiction to review the judgment of the Ninth Circuit under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case concerns the False Claims Act, which is now codified at 31 U.S.C. §§ 3729-3733. The provisions of that Act in effect before October 27, 1986, 31 U.S.C. §§ 3729-3731 (1982), and the False Claims Amendments Act as enacted on October 27, 1986, Pub. L. No. 99-562, 100 Stat. 3158 (1986), are both at issue.

The text of the False Claims Act as it existed before October 27, 1986 is reprinted in App. E, beginning at 34a. The text of the False Claims Amendments Act enacted October 27, 1986 is reprinted in App. F, beginning at 38a.

STATEMENT OF THE CASE

This case involves the applicability of the 1986 False Claims Amendments Act, which dramatically changed the False Claims Act. The amendments include a modification to the provision that barred private *qui tam* suits when the information that formed the predicate of the false claim alleged by the private party was already in the possession of the United States. As relevant here, the false claims allegedly made to the Government by petitioner Northern all occurred prior to the enactment of the 1986 Amendments. It is also undisputed that under the pre-1986 version of the Act, the respondent's *qui tam* suit would have been barred as the information was in the possession of the United States at the time the suit was filed. The District Court held that the pre-1986 law applies because Northern's claims to the Government were all submitted before 1986. The Ninth Circuit reversed, ruling that the 1986 Amendments, which permit *qui tam* suits to go forward even if the Government already has knowledge of the information on which the *qui tam* suit is based, apply because the respondent here brought the allegations about Northern's pre-1986 conduct to the attention of the United States after Congress enacted the 1986 Amendments.

A. The False Claims Act

Before 1986, the False Claims Act created civil liability for a person who "knowingly presents . . . a false or fraudulent claim for payment or approval" to the United States Government. Such person could be found liable to the Government for damages, civil penalties and costs of the civil

action. 31 U.S.C. § 3729 (1982).[2] App. E, at 34a. Other provisions created criminal liability for false claims. *See* 18 U.S.C. §§ 287, 1001 (1982).

The pre-1986 False Claims Act authorized the Government to bring a civil action for violation of the Act. 31 U.S.C. § 3730(a) (1982). The Act also contained *qui tam* provisions under which an individual ("relator") could bring a civil action against anyone believed to have violated the Act. *Id.*, § 3730(b)(1) (1982). The *qui tam* relator was entitled to receive a bounty representing a portion of the proceeds recovered against the defendant. *Id.*, § 3720(c)(2). The Government could take over a *qui tam* action after being notified of the suit and if it did so, the *qui tam* relator received a reduced share of any ultimate recovery. *Id.*, §§ 3730(b)(2) and (c)(1).

Under the pre-1986 version of the False Claims Act, dismissal of an action brought by a *qui tam* relator was required, *sua sponte* or on motion of the defendant, if the Government did not intervene and the action was "based on evidence or information the Government had when the action was brought." *Id.* § 3730(b)(4). Under the pre-1986 rule, the Government has sole discretion whether to prosecute once it receives information on potential violations of the Act.

Congress completely rewrote the False Claims Act in 1986, adopting harsher penalties and damages and making it

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[2] Citations to the pre-October 27, 1986 version of the False Claims Act are presented here as: 31 U.S.C. § xxxx (1982). Citations to the post-October 27, 1986 version of the False Claims Act are presented here as: 31 U.S.C. § xxxx (Supp. V 1987). Congress amended the False Claims Act again in 1988 and 1990 to correct minor typographical errors and cross-references, but those amendments are not relevant to this dispute.

easier to assert and prove violations of the Act. The False Claims Amendments Act, enacted on October 27, 1986, encourages *qui tam* actions and increases the potential liability of defendants under the Act. The 1986 Act's changes include the following:

- Reduced Scienter. Congress lowered the scienter requirement, changing the previous intent requirement of "knowingly," by re-defining the term as including "acts in reckless disregard of the truth or falsity of the information" and dispensing with any proof of "specific intent to defraud." *Compare* 31 U.S.C. § 3729 (1982) *with* 31 U.S.C. § 3729(b) (Supp. V 1987).

- Increased Damages/Penalties. Congress increased the damages recoverable from two times actual damages to treble damages and it increased the civil penalty from $2,000 per violation to a range of $5,000 to $10,000 per violation. *Compare* 31 U.S.C. § 3729 (1982) *with* 31 U.S.C. § 3729(a) (Supp. V 1987).

- Increased Bounty to *Qui Tam* Plaintiff. Congress increased a *qui tam* relator's potential bounty from 10% to a range of 15-25% if the Government takes over the action, and from a range of "not more than 25 percent" to "not less than 25 percent and not more than 30 percent" if the Government does not proceed with the action. *Compare* 31 U.S.C. § 3730(c)(1) & (2) (1982) *with* 31 U.S.C. § 3730(d)(1) & (2) (Supp. V 1987).

- Lower Burden of Proof. Congress lowered the burden of proof to a "preponderance of the evidence" from the clear and convincing evidence standard that courts had been applying. *Compare* 31 U.S.C. § 3731(c) (Supp. V 1987) *with Hageny v.*

United States, 570 F.2d 924, 933 (Court of Claims 1978).

- Longer Statute of Limitations. Congress extended the statute of limitations. The old statute of limitations had been six years from the date the violation is committed. The new statute of limitations is the later of either six years after the date on which the violation is committed, or three years after the date material facts about the violation are known to the United States but in no event more than ten years after the date on which the violation is committed. *Compare* 31 U.S.C. § 3731(b) (1982) *with* 31 U.S.C. § 3731(b) (Supp. V 1987).

- New Employment Discrimination Remedy. Congress created a new remedy for whistleblowers whose employers discharge or discriminate against them, giving them the right to reinstatement, double backpay, special damages, costs and attorneys' fees. 31 U.S.C. § 3730(h) (Supp. V 1987).

- New Estoppel Rule. Congress provided that a final judgment, guilty plea, or nolo contendere plea in a criminal proceeding charging fraud or false statements would "estop the defendant from denying the essential elements of the offense" in any subsequent civil action under the False Claims Act. 31 U.S.C. § 3731(d) (Supp. V 1987).

- New Civil Investigative Powers. Congress gave the Attorney General broad civil investigative powers to gather evidence and testimony in response to a civil investigative demand before commencing any civil proceeding under the False Claims Act. 31 U.S.C. § 3733 (Supp. V 1987).

- Change From Government Knowledge Bar to "Original Source" Rule. Congress eliminated the bar to *qui tam* actions that gave the Government

exclusive control over claims based on information already in the Government's possession. It replaced the government knowledge bar rule with provisions barring the exercise by the federal courts of jurisdiction over claims by members of Congress, the judiciary, and senior executive branch, claims that are the subject of actions in which the Government is already a party, and cases based on public disclosure of allegations unless the plaintiff is the "original source" of the allegations. *Compare* 31 U.S.C. § 3730(b)(4) (1982) *with* 31 U.S.C. § 3730(e) (Supp. V 1987). Under the pre-1986 version of the Act, government contractors had an absolute defense against *qui tam* suits when the Government had prior knowledge of the information on which the claims were based; the Government remained free to pursue such claims but *qui tam* relators could not do so.

- New Government Control Provisions to Bolster Act's Constitutionality. Congress clarified and strengthened the Government's control over *qui tam* actions in a plain attempt to bolster the questionable constitutionality of the previous version of the Act. *Compare* 31 U.S.C. § 3730 (1982) *with* 31 U.S.C. § 3730(c) (Supp. V 1987).

The 1986 False Claims Amendments Act contains no clause addressing whether its provisions are to be applied retroactively; nor does the legislative history (assuming the relevance of such history) provide any guidance on whether Congress intended for these Amendments to be applied retroactively. *See, e.g., United States ex rel. Schumer v. Hughes Aircraft Co.*, __ F.3d __, 1995 WL 502989 at * 3 (9th Cir. Aug. 22, 1995). The 1986 Amendments also do not contain a severability provision.

B. Anderson's Claims Against Northern, Including His *Qui Tam* Allegations Under The False Claims Act

Northern sells digital telecommunications switching systems to various customers, including the military. App. A, at 2a. Relator Theodore Anderson voluntarily left Northern's employ, and in 1988 he presented allegations to the FBI that Northern sold defective equipment to the military. *Id.* "The United States investigated and then chose not to pursue the claim. In 1990, Mr. Anderson sued under the *qui tam* provisions of the False Claims Act. The government chose not to intervene." *Id.*

In his *qui tam* action, Anderson contended that the grounding design of Northern's switches was deficient. Anderson's claims concerned telecommunications switches sold both before and after 1986. This petition concerns only the switches that were sold before October 27, 1986. The District Court held Anderson lacked evidence of any false claim for switches sold after October 27, 1986, and the Ninth Circuit affirmed.

C. Proceedings Below in the District Court and Ninth Circuit

1. The District Court Holds That The 1986 Amendments May Not Be Applied Retroactively

In the District Court, Northern contended that the False Claims Act's government knowledge bar rule in 31 U.S.C. § 3730(b)(4) (1982) provided an absolute defense against Anderson's suit with regard to switches sold before 1986 and thus required the District Court to dismiss the case. Northern relied on the undisputed fact that Anderson had disclosed to the Government, before he brought this action, the

information on which he based his allegations in this case. *See, e.g., Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 669 (9th Cir. 1978). The District Court found that "Mr. Anderson presented the information upon which his False Claims Act allegations are based to the Government in July of 1988 -- one and one-half years before this action was filed." App. B, at 24a.

The District Court rejected Anderson's argument that the 1986 False Claims Amendments Act should be applied retroactively. The Court held that the new version of the Act "broadens the scope of defendant's exposure to liability, by permitting claims that would have been precluded under the False Claims Act prior to its amendment in 1986." App. B, at 21a. In this regard, the District Court found that the 1986 Amendments would "'create a new liability in connection with a past transaction.'" *Id.*, at 22a (quoting *United States v. Murphy*, 937 F.2d 1032, 1038 (6th Cir. 1991)). Accordingly, the District Court held that "the 1986 Amendments to the False Claims Act have only prospective effect, and will not be applied to claims that were completed before October 27, 1986, the date on which the Amendments took effect." *Id.*, at 22a. The District Court thus found it unnecessary to reach Northern's argument that the False Claims Act's *qui tam* provisions are unconstitutional. App. B, at 26a-27a.

2. The Ninth Circuit Reverses On The Retroactivity Issue

On appeal, the Ninth Circuit held that the District Court should have applied the new provisions of the False Claims Amendments Act in determining whether the Government's prior knowledge barred Anderson's claims concerning switches paid for *before* October 27, 1986. In reaching this conclusion, the Court of Appeals purported "not [to] reach the question of whether the [1986 False Claims Act] amendment applies retroactively" by holding that "the

relevant conduct took place after the effective date of the [1986 False Claims Act] amendment." App. A, at 2a, 7a. In deciding what conduct and whose conduct was "relevant" to determine which version of the statute applied, the court focused exclusively on the dates Anderson disclosed the information to the Government and filed his lawsuit.

Accordingly, the Court of Appeals remanded the case "so that the district court may decide upon the claims under the amended version of the Act." App. A, at 8a. The Ninth Circuit based its decision on its understanding of this Court's decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), which was decided while this case was pending before the Ninth Circuit. In *Landgraf*, this Court clarified the analysis courts are to apply in determining whether a statute has retroactive effect and reaffirmed the long-standing presumption against retroactive application of statutes.

Although the Ninth Circuit cited the majority opinion in *Landgraf*, it appears not to have followed that opinion. The court concentrated on whose conduct was directly affected by the statutory change, while forgoing an analysis of the rights and liabilities of the parties affected by the 1986 Amendments. App. A, at 7a-8a. This approach appears to be based on a crabbed reading of Justice Scalia's concurring opinion in *Landgraf*, but is not the analysis the *Landgraf* majority opinion adopted. The Court of Appeals focused exclusively on Anderson's conduct and ignored the impact of the 1986 Amendments on Northern. The Court of Appeals held that because Anderson disclosed the information to the Government after the effective date of the 1986 Amendments, application of the Amendments to Anderson's conduct was prospective, not retroactive, and, therefore, the 1986 Amendments (or at least some portion of them) apply to actions arising under the pre-1986 Act. App. A, at 7a-8a. Such a finding overlooks the effect on Northern, which now finds itself embroiled in a baseless lawsuit that would

otherwise be barred under the statute in effect at the time of its actions, and barred by the clear language of the statute as then in effect.

REASONS FOR GRANTING THE WRIT

I

LOWER COURTS NEED GUIDANCE ON HOW *LANDGRAF'S* RETROACTIVITY PRINCIPLES SHOULD BE APPLIED TO AN INTEGRATED STATUTE WHOSE PROVISIONS WERE NOT INTENDED TO BE SEVERABLE FROM EACH OTHER

Northern requests the Court to grant certiorari to confirm that when courts conduct the retroactivity analysis that *Landgraf* mandates in the absence of a severability clause or other indicia of severability, they should presume that the statute at issue is one indivisible unit for retroactivity purposes absent clear congressional intent to the contrary.

A. The Lower Courts Are Mistakenly Interpreting *Landgraf* As Requiring That Retroactive Application Of Different Provisions Of The Same Statute Must Be Analyzed In Piecemeal Fashion

In *Landgraf*, the Court stated that "there is no special reason to think that all the diverse provisions of the [Civil Rights Act of 1991] must be treated uniformly" for purposes of analyzing whether that Act has retroactive effect. 114 S. Ct., at 1505. The Court explained that Congress's explicit instruction in the Civil Rights Act of 1991 that the provisions were to "take effect upon enactment" meant that "courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and pre-enactment conduct." *Id.* That Act contains a severability clause. 105 Stat. 1071, 1099 (§ 401).

The *Landgraf* majority authorized this fragmented approach to reviewing the retroactivity of the Civil Rights Act of 1991 only after a thorough review of the "*diverse*" provisions of that Act. *See* 114 S. Ct., at 1505 (referencing analysis at p. 1494) (emphasis added). The majority characterized the Civil Rights Act of 1991 as a "complicated piece of legislation containing more than 50 separate sections," some of which Congress specifically decreed would apply prospectively only, and others of which it left to the courts to determine. *See* 114 S. Ct., at 1494-95. After this thorough analysis of the statute's structure, the Court found to be "unsupported" the "assumption that Congress expected that all of the Act's provisions would be treated alike." *Id.*, at 1495 n.12. And only then did *Landgraf* authorize a piecemeal approach to examining statutory retroactivity of the "diverse" provisions of the 1991 Civil Rights Act.

The lower courts, including the Ninth Circuit below, have misunderstood *Landgraf* as directing that the retroactivity of statutes must be analyzed in piecemeal fashion, section-by-section, regardless whether Congress expressed an intent for provisions of that statute to be severable. *See, e.g., Chenault v. U.S. Postal Service*, 37 F.3d 535, 538 (9th Cir. 1994) (emphasis added) ("*Landgraf* created a scheme whereby courts must scrutinize *each provision* of a given statute to ascertain whether it is 'substantive' or 'procedural,' . . ."); *United States ex rel. Anderson v. Northern Telecom Inc.*, 52 F.3d at 814-15, App. A., at 8a ("Because Mr. Anderson acted after the amendment, and the amendment changed the consequences only of his conduct, application of the amendment to his conduct is prospective, not retroactive."); *United States ex rel. Lindenthal v. General Dynamics*, 61 F.3d 1402, 1408 n.6 (9th Cir. 1995) (emphasizing that only one portion of 1986 False Claims Amendments Act is to be applied to pre-enactment conduct and other portions of the amendments probably may not be so applied); *see also United States ex rel. Newsham v. Lockheed Missiles and Space*

Company, Inc., 1995 WL 241444 at *4, 7-8, 11 (N.D. Cal. Apr. 20, 1995) (holding "original source" rule and bounty provisions could be applied retroactively but the new statute of limitations, scienter standard, and damages and penalties provisions could not because "the Court must consider separately the temporal reach of each provision of the 1986 Amendments to the FCA."); *cf. United States ex rel. Boisvert v. FMC Corp.*, No. C-86-20613, 1987 U.S. Dist. LEXIS 13549 at *14 (N.D. Cal. Sept. 8, 1987) ("It would seem absurd that certain *qui tam* provisions could be retroactively applied to block a defense of defendant when others clearly must operate prospectively only. Therefore, it would appear the *qui tam* provisions are not intended to be retroactive.").

Before *Landgraf*, some circuits recognized the danger in presuming a fragmented approach to retroactivity. *See, e.g., Griffon v. United States Department of Health and Human Services*, 802 F.2d 146, 151 (5th Cir. 1986). In *Griffon*, the Fifth Circuit explained: "the intent to retroactively sever substantive and procedural application does not appear in the [statute]"; "severance cannot be implied simply to avoid problems of wholesale retroactivity." Elaborating on this point, it added: "It would be most presumptuous for a court to assume Congress meant to allow retroactivity by indirection, in the face of the established presumption which requires that only prospective operation be given every statute which changes established rights unless retroactive application is the unequivocal and inflexible import of the terms of the legislation and the manifest intention of the legislature." *Id.*, at 153. Consequently the Fifth Circuit declined to allow an administrative agency to engage in "'creative and imaginary statutory surgery'" to facilitate the statute's partial retroactive application. *Id.*, at 155 (quoting *Bowsher v. Synar*, 478 U.S. 714 (1986)). Because of the Court's statements in *Landgraf*, however, some lower courts now mistakenly assume that the fragmented approach is the only correct approach.

Before concluding that portions of a statute may be applied to pre-enactment events because they do not have any impermissible retroactive effect, courts should consider whether such portions are severable from admittedly retroactive provisions of the same statute. Yet because *Landgraf* did not explicitly mandate such analysis, most courts are not even considering this important issue.

B. The Lower Courts Need Clarification About How To Apply This Court's Precedents Concerning Severability Of Statutes To Retroactivity Questions Under *Landgraf*

This Court needs to clarify how its existing precedents concerning the severability of statutes apply to retroactivity analyses under *Landgraf*. When this Court has held that provisions of a statute are unconstitutional, it has analyzed whether the invalid provisions of a statute are severable from other provisions. Those precedents call for invalidating as few sections as possible of a statute--a recognition of the limited institutional role of the courts in our system. Nevertheless, if these same severability precedents are applied in the *Landgraf* context, they undercut *Landgraf*'s default rule favoring non-retroactive application of statutes.

Some of this Court's decisions have described a "presumption of inseparability" by which courts presume "the legislature intended the Act to be effective as an entirety or not at all." *See, e.g., Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 434 (1938). If Congress includes a severability clause, this reverses the presumption of inseparability and represents a statement from Congress "that the statute is not an integrated whole" which must be sustained or invalidated as a unit. *Id.* When Congress includes a severability clause, "divisibility and not integration is the guiding principle." *Id.; see also Champlin Refining Co. v. Corporation Comm.*, 286 U.S. 210, 235 (1932).

Recent cases have attributed less significance to Congress's decision not to include a severability clause. "In the absence of a severability clause, however, Congress' silence is just that -- silence -- and does not raise a presumption against severability." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987); *see also New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 2434 (1992); *In re Reyes*, 910 F.2d 611, 613 (9th Cir. 1990) (absence of a severability clause "does suggest an intent to have all components 'operate together or not at all'"). A plurality of the Court has even referenced a "presumption . . . in favor of severability" in the context of deciding how much of a statute must fall when one provision is found to be constitutionally invalid. *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion of White, J.). When Congress does not include a severability clause, courts instead are to look for indications of congressional intent of severability from the language and structure of the statute.[3] *Alaska Airlines*, 480 U.S., at 687.

Such statements applying a presumption of severability are based on the constitutionally mandated principle that a court should refrain from invalidating more of a statute than is necessary. *See Alaska Airlines*, 480 U.S. at 684. When

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[3] Absent a severability clause, portions of a statute may be severed from others only if it is evident Congress would have "'enacted those provisions which are within its power [i.e., constitutional], independently of that which is not.'" *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 931-32 (1983) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)). A provision is only presumed severable "if what remains after severance 'is fully operative as a law.'" *Chadha*, 462 U.S. at 934 (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932)).

striking down a statute, the Court must strive to minimize its intrusion into the legislative sphere.

Holding that portions of a statute do not have retroactive effect and therefore may be applied to pre-enactment events is similar in some respects to invalidating part of a statute as unconstitutional. In both situations, courts are altering the package of statutory provisions that Congress enacted.

Nevertheless, in the context of a *Landgraf* retroactivity analysis, applying a presumption favoring severability even in the absence of a severability clause is tantamount to a presumption *favoring* retroactive application of statutes despite congressional silence. Yet *Landgraf* holds otherwise and mandates that retroactive statutes may not be presumed to apply to pre-enactment conduct absent clear congressional intent to the contrary. 114 S. Ct., at 1505.

Thus, in addressing the retroactivity problem presented by the case below, the Court would be providing important clarification of how severability principles apply to the possible retroactive application of an integrated statute like the False Claims Amendments Act. In clarifying this issue, the Court should confirm its own previous ruling that courts should not usurp Congress's role to craft packages of legislative amendments. *See United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 316-17 (1908) (cited with approval in *Landgraf*, 114 S. Ct. at 1507). In that case, the Court refused to fragment a statute when it found such fragmentation contrary to Congress's intent: "[W]e see no reason for holding that this statute, of but one section, should be split up in its construction, and one portion of it made applicable to cases already existing and other portions applicable only to the future. We are convinced Congress did not intend such separation." 209 U.S., at 316-17; *see also*

United States v. Fernandez-Toledo, 749 F.2d 703, 705 (11th Cir. 1985) (declining to find partial retroactivity).

C. The Courts Of Appeals Are Divided On The Important Question Of When, If At All, The 1986 False Claims Amendments Act Can Apply To Alleged Violations Preceding Its Enactment

In the absence of any guidance from this Court as to the significance of the absence of a severability clause or other indicia of severability for purposes of retroactivity analysis, the lower courts are predictably divided as to when, if at all, the 1986 False Claims Amendments Act is to be applied to alleged violations preceding its enactment. The Ninth Circuit's conclusion below that one provision of the 1986 Amendments can be severed from the others and applied to control pre-1986 violations directly contradicts the Sixth Circuit's decision in *United States v. TRW, Inc.*, 4 F.3d 417 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994).

In *TRW*, the Sixth Circuit held that the 1986 False Claims Amendments Act (including the provision eliminating the government knowledge bar rule) may not be applied retroactively. 4 F.3d, at 422-23. Although decided before *Landgraf*, the Sixth Circuit looked to the effect of the 1986 Amendments on the rights and liabilities of the parties and concluded that the expansion in claims cognizable under the new Act constitutes a substantive change in the law because it "expanded the circumstances under which citizens may bring false claims suits" and gave "*qui tam* plaintiffs more rights to participate in the litigation and a greater share in the recovery." 4 F.3d, at 422. The Sixth Circuit held that the pre-1986 version of the Act governed because it was in effect "at the time the [government contractor] conduct that is the subject of this litigation occurred." 4 F.3d, at 423.

The result reached by the *TRW* court is irreconcilable with the Ninth Circuit's decision in the case at bar. The Sixth Circuit's analysis necessarily assumes the absence of any congressional intent that different provisions of the 1986 Amendments be treated differently for retroactivity purposes. In announcing the rule urged by Northern in this petition, this Court would provide an analytical basis to support the result reached by the Sixth Circuit and to be applied by the lower courts faced with retroactivity issues on a daily basis across the country.

The Ninth Circuit would have made the opposite ruling in the case below if it had correctly recognized that the provisions of the False Claims Amendments Act are not severable from each other. Every other circuit that has considered the retroactivity of any portion of the Act has held that this Act may not be applied retroactively. *See Miller v. Federal Energy Management Agency*, 57 F.3d 687, 689-90 (8th Cir. 1995) (the Amendments' civil penalty and treble damages provisions cannot be applied to a claim that "ripened" when the statute of limitations on that claim began to run as of July 18, 1986 -- before enactment of the 1986 Amendments); *United States v. TDC Management Corp.*, 24 F.3d 292, 298 (D.C. Cir. 1994) ("The amendments' civil penalty and treble damages provisions clearly expand the potential scope of liability under the Act" and therefore cannot be applied retroactively); *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1266 (1st Cir. 1992) (opinion by then-Chief Judge Breyer) (the relaxed intent requirements of the 1986 Amendments may not be applied to pre-1986 violations); *United States v. Murphy*, 937 F.2d 1032, 1037-38 (6th Cir. 1991) (holding that the amended definition of "knowingly" could not be applied to pre-enactment violations of the Act); *see also United States v. American Heart Research Found., Inc.*, 996 F.2d 7, 9 (1st Cir. 1993) (affirming district court's ruling that 1986 Amendments do not apply retroactively).

II.

THE NINTH CIRCUIT'S POSITION THAT THE 1986 AMENDMENTS DO NOT IMPLICATE SUBSTANTIVE RIGHTS AND THEREFORE ARE NOT RETROACTIVE IN EFFECT CONFLICTS WITH *TRW* AND PRESENTS AN IMPORTANT QUESTION OF BROAD APPLICABILITY THIS COURT SHOULD RESOLVE

A. The Ninth Circuit's Assumption That A "Jurisdictional" Or "Procedural" Statute Cannot Affect Substantive Rights Conflicts With *Landgraf* And The Decisions Of The Sixth Circuit

In this case, the Ninth Circuit purported to distinguish *United States v. TRW, Inc.*, 4 F.3d 417 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994). The Ninth Circuit relied on the fact that the *qui tam* plaintiff in *TRW* disclosed the information concerning the alleged false claim to the Government before the 1986 Amendments took effect, App. A, at 7a, whereas in this case the disclosure came after the effective date of the 1986 Amendments.

The Ninth Circuit's purported distinction, however, is fundamentally flawed because it assumes that an adjustment to the rights of relators whose conduct occurred after the effective date of the 1986 Amendments has no legal impact on the substantive rights of a False Claims Act defendant whose conduct occurred before the effective date of the 1986 Amendments. Yet if Northern had an absolute defense against prosecution by a private relator before October 27, 1986 (which it did), but is to be stripped of that defense by virtue of the 1986 Amendments, it is preposterous to suggest that that result does not affect Northern's substantive rights. In short, the distinction drawn by the Ninth Circuit panel in this case cannot withstand even cursory scrutiny and, indeed,

was quickly abandoned by the Ninth Circuit in two subsequently decided cases, *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995), and *United States ex rel. Schumer v. Hughes Aircraft Co.*, __ F.3d __, 1995 WL 502989 (9th Cir., Aug. 22, 1995).[4]

In *Lindenthal*, the Ninth Circuit relied on the discussion in *Landgraf* concerning "jurisdictional" statutes. The Ninth Circuit characterized Congress's elimination of the government knowledge bar rule in 1986 as merely a "jurisdictional" amendment, which it believed could not have any impermissible retroactive consequences. 61 F.3d at 1408. Applying a rationale similar to Justice Blackmun's dissent in *Landgraf*, 114 S. Ct. at 1509-10, the Ninth Circuit stated: "The amendment simply did not alter GD's [General Dynamics] underlying obligation not to commit fraud upon the government." 61 F.3d at 1408. In *Schumer*, the Ninth Circuit rejected any pretense of relying on post-1986 conduct to justify retroactive application of the Act. In *Schumer*, unlike *Anderson*, the Government had the information relating to the *qui tam* relator's allegations before Congress passed the 1986 Amendments. Abandoning the dubious distinction the panel in the case at bar had purported to draw, the Ninth Circuit simply decided that these amendments were of the jurisdictional variety and therefore apply to all cases decided after the 1986 Amendments became law. *Id.* at *3.

In adopting the rationales set forth in *Lindenthal* and *Schumer*, the Ninth Circuit at least articulated a theory, albeit

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[4] A third additional *qui tam* case presenting this issue of the retroactivity of the False Claims Amendments Act was argued to the Ninth Circuit on September 15, 1995 and is expected to be decided soon. *See Hyatt v. Northrop Corp.*, Nos. 94-55638, 94-55578 (9th Cir.) (pending).

flawed, that would justify its decisions in the case at bar as well as those two cases. This theory, however, puts the Ninth Circuit squarely in conflict with the Sixth Circuit's 1994 decision in *TRW*, where that court held that because the conduct of the defendant in that case occurred before the 1986 Amendments became law, the very provisions of the 1986 Amendments at issue in this case should not be applied retroactively. 4 F.3d at 422-23.

B. The Lower Courts Need Guidance As To When Statutes That Are Jurisdictional Or Procedural In Form May Be Applied Retroactively

The rule now in effect in the Ninth Circuit is not just irreconcilable with *TRW*. Because it will presumably be applied in all cases involving questions of retroactivity arising in the Ninth Circuit, it erects what appears to be a *per se* rule that if a provision of a statute affecting substantive rights and obligations is cast in jurisdictional or procedural terms, as is the case here, that provision will automatically be applied retroactively. In short, the Ninth Circuit is abandoning any pretense of applying *Landgraf* to a situation in which a statute affecting substantive rights is drafted to operate directly on the jurisdiction of or procedure utilized by a court.

The Ninth Circuit's reasoning in this regard is squarely inconsistent with the decisions of numerous federal courts of appeals holding that statutes affecting jurisdiction will not be given retroactive effect where substantive rights would be affected. Thus, for example, in *Woolf v. Bowles*, 57 F.3d 407, 409-10 (4th Cir. 1995), a post-*Landgraf* decision, the Fourth Circuit held that a statutory provision eliminating the federal government's sovereign immunity from liability for prejudgment interest was not applicable retroactively, even though sovereign immunity is a jurisdictional defense (*see, e.g., United States v. Mottaz*, 476 U.S. 834, 841 (1986); *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). The

Fourth Circuit reasoned that "requiring the federal government to pay interest would disrupt the longstanding expectation created by the [jurisdictional] no-interest rule, and thus unquestionably would impose an important new legal burden on the federal government." 57 F.3d, at 410. Other Courts of Appeals have reached the same conclusion, both before and after the Supreme Court's decision in *Landgraf*. *See, e.g., Edwards v. Lujan*, 40 F.3d 1152, 1154 n.1 (10th Cir. 1994), *pet. for cert. pending*, No. 95-88; *Huey v. Sullivan*, 971 F.2d 1362, 1365 (8th Cir. 1992), *cert. denied*, 114 S. Ct. 1642 (1994).

Similarly, Courts of Appeals have held that the Foreign Sovereign Immunities Act (FSIA), which "give[s] the district courts jurisdiction to hear civil cases involving claims against foreign states," is not to be applied retroactively. *Corporacion Venezolana de Fomento v. Vintero Sales*, 629 F.2d 786, 790-91 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *accord Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.), *cert. denied*, 487 U.S. 1219 (1988); *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987). Even though the FSIA "was not intended to affect the 'substantive law of liability,'" *id.*, at 1497, retroactive application was found to be inappropriate because elimination of the preexisting jurisdictional bar to suit "would interfere with antecedent rights of" defendants and thus "would be manifestly unfair." *Id.*, at 1497-97. The same is true, of course, of retroactive application of the 1986 amendment to the government knowledge bar rule, because that amendment eliminates a pre-existing barrier to suit by relators. The fact that that barrier was converted in the 1986 Act from an absolute defense into what is in form a jurisdictional bar does not make retroactive application any more appropriate in this context than it did in the sovereign immunity cases, and the Ninth Circuit's analysis is therefore in direct conflict with those decisions.

The analysis and the result reached by the Ninth Circuit in these False Claims Act cases also cannot be squared with this Court's brief but focused discussion of the "jurisdictional" and "procedural" exception to the presumption of non-retroactivity confirmed in *Landgraf* itself. The *Landgraf* Court said that application of a new jurisdictional rule "*usually* 'takes away no substantive right'," 114 S. Ct., at 1502 (emphasis added). "Present law *normally* governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" 114 S. Ct., at 1502 (emphasis added) (quoting *Republic National Bank of Miami v. United States*, 113 S. Ct. 554, 565 (1992) (Thomas, J., concurring in part and concurring in judgment)). The Court explained that changes in procedural rules (such as those affecting the jurisdiction of a court) may "*often* be applied in suits arising before their enactment without raising concerns about retroactivity." 114 S. Ct., at 1502 (emphasis added). The Court was careful to add, however, that it was not holding "that concerns about retroactivity have no application to procedural rules." 114 S. Ct., at 1502-03 n. 29.

The Ninth Circuit read the limiting words of "usually," "normally," and "often" right out of the Court's careful exposition of the exception for "jurisdictional" and "procedural" statutes. The Ninth Circuit mistakenly assumed that even though Congress, in the 1986 Amendments, "changed the consequences of Mr. Anderson's conduct," Congress "did not change the legal consequences of Northern Telecom's conduct." App. A, at 7a. Of course, in *Lindenthal* and *Schumer* the Ninth Circuit pursued the same logic based on the *Anderson* decision, acknowledging that the 1986 Amendments affected substantive rights of private relators and the Government but denying that that enactment had "a deleterious effect on substantive rights." *Lindenthal*, 61 F.3d at 1408; *Schumer*, at *3.

The Ninth Circuit's analysis is flawed in two respects. First, the question to be asked in considering whether the "jurisdictional"/"procedural" exception applies is whether the provision *affects* substantive rights of any persons, not whether the statute has "deleterious" effects on one category of persons to whose conduct the statute applies but not another category of person to whose conduct the statute also applies. In *TRW*, the Sixth Circuit emphasized that the provision at issue here *enhanced* the substantive rights of private relators and the Government, and proceeded to hold at the behest of a False Claims Act defendant that this provision was not to be applied retroactively. 4 F.3d, at 423.

Second, the Ninth Circuit's analysis assumes, without discussion, that what Congress gave to private relators in the 1986 Amendments did not involve a derogation of Northern's right under the pre-1986 Act to be free from prosecution by a private relator -- but not the Government -- where the private relator's suit is based on information already in the possession of the Government when the relator's suit is brought.

The Ninth Circuit observes in the case at bar in defense of its conclusion that the 1986 Amendments affected no substantive rights of Northern that "[i]f Northern Telecom really did submit a fraudulent claim, it became liable and remained liable to the government and to potential *qui tam* relators." App. A, at 7a. This misstatement, however, assumes the point at issue. Prior to 1986, if a government contractor submitted a false claim but the Government chose not to bring an action on that claim for any reason or, indeed, for no reason at all, the government contractor could not be held liable in an action brought by a private relator on the basis of information already possessed by the Government at the time of the filing of the private relator's action. Northern's potential liability in these circumstances was limited by operation of the False Claims Act to cases in which the Government chose to initiate an action.

The ability to avoid being hailed into court by a private citizen pursuant to a complaint based on alleged injury to the Government where the Government has chosen not to pursue its potential action based on the same facts is clearly a legal "right" if the concept of rights and obligations has any meaning. The prosecution by private parties of actions that would normally and logically be prosecuted -- or not prosecuted -- by the Government itself in the exercise of its prosecutorial discretion raises significant constitutional issues that cannot be dismissed as merely "procedural" or "jurisdictional." *Cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 790, 809 (1987) (counsel for party that is beneficiary of court order may not be appointed to prosecute violation of that order in place of disinterested government prosecutor). Indeed the Assistant Attorney General in charge of the Office of Legal Counsel has advised the Attorney General that the False Claims Act is unconstitutional to the extent that it places in private hands the authority to prosecute civil actions against defendants such as Northern.[5] Although the question of the constitutionality of the 1986 Amendments and, specifically, § 3730(e), is not before the Court at this time, the question whether the 1986 Amendments narrowed an existing statutory right of defendants in *qui tam* actions by liberalizing the conditions under which private relators can bring civil actions against such defendants is. The same section that eliminated the government knowledge bar rule (§ 3730) expanded the power of private relators while increasing the Government's control over such relators' *qui tam* actions. Northern submits that there is no room to disagree about

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[5] July 18, 1989 Memorandum from Assistant Attorney General William P. Barr to Attorney General Dick Thornburgh, 13 Opinions of Office of Legal Counsel 249-86 (1989).

whether this increased exposure of defendants to actions brought by private relators diminished the existing statutory rights of those defendants even if such defendants would be held not to be constitutionally insulated from prosecution by a private relator.

The critical point for purposes of this Court's consideration whether to grant this petition is that the Ninth Circuit's rule, under which a presumption arises in favor of retroactive application when a statute is cast as "jurisdictional" or "procedural," opens the door to the destruction of pre-existing substantive rights by statutes that express no intent to do so. In effect, the Ninth Circuit reverses the contrary presumption reaffirmed in *Landgraf* that statutes affecting substantive rights are to be applied prospectively absent a clear congressional intent that they also be applied retroactively. Because the Ninth Circuit's rule reflects an egregious misinterpretation of *Landgraf* that sows the seeds for considerable mischief in a broad range of cases, this Court should step in now to prevent further misuse of its decision in *Landgraf*.

C. The Lower Courts' Confusion About Applying *Landgraf*'s Exception For Jurisdictional/ Procedural Statutes Is Apparent From Recent Cases Concerning Amendments To Statutes Of Limitations

Recent decisions concerning the potential retroactive application of changes in statutes of limitations also illustrate the confusion already observable in the lower courts in applying *Landgraf*'s exception for "jurisdictional" or "procedural" rules. Statutes of limitations can be characterized as jurisdictional or procedural rules governing principally the "secondary" conduct of the potential plaintiff who seeks to file suit. Yet courts recognize the right that statutes of limitations also confer on potential defendants to

be free from defending stale claims.[6] This right necessarily also affects potential defendants' "primary" conduct.

In applying *Landgraf*, the Courts of Appeals are already divided over whether amendments to statutes of limitations affecting substantive rights shall be applied retroactively in the absence of any direction by Congress on the issue. Statutes of limitations are directed to the actions of the plaintiff bringing suit in much the same way as the 1986 amendment to the False Claims Act's government knowledge bar rule was directed, in part, to the actions of a private relator-plaintiff.

Some circuits, including the Ninth, have concluded that statutes of limitations affect substantive rights and therefore cannot be dismissed as merely jurisdictional or procedural. In *Chenault v. U.S. Postal Service*, 37 F.3d 535, 538-39 (9th Cir. 1994), the Ninth Circuit applied *Landgraf* and found that an extension in Section 114 of the Civil Rights Act of 1991 of the time for filing discrimination claims against the federal government from 30 days to 90 days would have an impermissible retroactive effect if applied to claims that arose before the Act's enactment. It explained that it did "not find the substantive/procedural dichotomy helpful in deciding" the

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6 For example, this Court has said: "The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980). In *Walker*, the Court reaffirmed that for *Erie* doctrine purposes in diversity cases, federal courts are to treat state statutes of limitations and rules concerning their operation as substantive and apply those rules rather than federal procedural rules. 446 U.S., at 748-53.

case. *Id.*, at 539. The court explained: "Regardless of whether a statute is 'substantive' or 'procedural,' it may not apply to cases pending at the time of enactment if the new statute would prejudice the rights of one of the parties." *Id.* "In this case the rights of the defendant would be altered and its liability increased because it would be forced to defend an action that was previously time-barred." *Id.* The Tenth Circuit reached a similar result applying *Landgraf* in *Million v. Frank*, 47 F.3d 385, 389-90 (10th Cir. 1995). It agreed that Section 114 of the Civil Rights Act of 1991 "would alter the substantive rights of both the plaintiff and the defendant." *Id.*, at 390. "Plaintiff would be afforded relief where previously there was none to be gained. The defendant would be stripped of his right to raise a valid defense and would be forced to defend an action previously time-barred: defendant's liability would be substantially increased." *Id.*

Nevertheless, other circuits categorize statutes of limitations as not affecting any legitimate pre-existing right. The Second Circuit has held that "applying a new or amended statute of limitations to bar a cause of action filed after its enactment, but arising out of events that predate its enactment, generally is not a retroactive application of the statute." *Vernon v. Cassadaga Valley Central School District*, 49 F.3d 886, 889 (2d Cir. 1995). Citing *Landgraf*, the court concluded that such an amendment implicated only "secondary" conduct and therefore did not have an impermissible retroactive effect: "The conduct to which the statute of limitations applies is not the primary conduct of the defendants, the alleged discrimination, but is instead the secondary conduct of the plaintiffs, the filing of their suit." *Id.* at 890. Consequently, according to the Second Circuit: "Retroactivity concerns, therefore, generally do not bar the application of a changed statute of limitations to a complaint filed after the amendment." *Id.* at 890. The Eighth Circuit has taken the same position, characterizing a limitations period as "procedural," and then holding that such a change

may be applied to claims accruing before the change, even when that meant potential plaintiffs would lose their claims. *See Anderson v. Unisys Corp.*, 52 F.3d 764, 765 n.1 (8th Cir. 1995), *pet. for cert. filed*, No. 95-95, 64 U.S.L.W. 3069 (U.S. August 1, 1995); *Garfield v. J.C. Nichols Real Estate*, 57 F.3d 662, 664-65 (8th Cir. 1995).

These decisions further illustrate the confusion manifest in the lower courts since *Landgraf* was decided about when a jurisdictional or procedural statute would retroactively affect substantive rights in an impermissible manner. Depending on how one defines the inquiry of *whose conduct* is regulated by an arguably "procedural" or "jurisdictional" rule, the answer can be quite different. If a court can find, as the Ninth Circuit did below, that for retroactivity purposes a statute can be deemed not to affect the conduct of the principal party the statute regulates and whose potential civil liability the statute creates, such an inquiry will lead to capricious and inconsistent results.

Granting certiorari here will give the Court an excellent opportunity to clarify these vexing issues for the lower courts concerning the retroactivity of potentially "jurisdictional" or "procedural" changes. Until this matter is clarified, courts are sending mixed signals and reaching irreconcilable conclusions, making it quite difficult for people to determine what law applies and to conform their behavior accordingly.

CONCLUSION

The petition for a writ of certiorari should be granted.

September 20, 1995

Respectfully submitted,

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APPENDIX A

UNITED STATES of America ex rel.
Theodore R. ANDERSON,
Plaintiff-Appellant,
v.
NORTHERN TELECOM, INC.,
Defendant-Appellee.

No. 93-35520.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 3, 1994.
Decided April 20, 1995.
As Amended May 25, 1995.

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OPINION

Appeal from the United States District Court for the Western District of Washington.

Before: ALARCÓN, BEEZER and KLEINFELD, Circuit Judges.

KLEINFELD, Circuit Judge:

The district court dismissed most of the *qui tam* claims in this case for lack of subject matter jurisdiction, on the ground that the 1986 amendment to the False Claims Act did not apply retroactively. One claim was dismissed on summary judgment, because the plaintiff did not establish a prima facie case of fraud. We conclude that the retroactivity analysis was mistaken, because the relevant conduct took place after the effective date of the amendment. We agree, however, that no prima facie case of fraud was made out on the claim dismissed on summary judgment.

I. Facts

Northern Telecom sells digital telecommunications switching systems, called "switches," worth about $2 million each to the military. The gist of Mr. Anderson's claims is that Northern Telecom knew the switches were defective, but tried to palm them off on the government.

All the switches in this case were delivered, invoiced and paid for before 1986, except for one switch at Letterkenny Army Depot. The False Claims Act was amended in 1986 in a way that changed the consequences if the relator told the government about the fraudulent claim before bringing suit. Mr. Anderson left Northern Telecom's employ. In 1988, he told the FBI about Northern Telecom's allegedly fraudulent practices. The United States investigated, and then chose not to pursue the claim. In 1990, Mr. Anderson sued under the *qui tam* provisions of the False Claims Act. The government chose not to intervene.

The district court dismissed the claims based on the switches sold and paid for before 1986, on the ground that the 1986 amendments to the False Claims Act applied prospectively to false claims made after the date of the

amendment. Because Northern Telecom had submitted its allegedly false claims before 1986, the district court applied the pre-1986 law. Under the old law, Mr. Anderson's report to the FBI would have precluded his subsequent *qui tam* lawsuit.

The Letterkenny Army Depot switch was paid for after 1986, so the district court applied the new law. The court granted summary judgment for Northern Telecom on this switch, because Mr. Anderson had no evidence of fraud.

II. Analysis

We have jurisdiction over the district court's final judgment under 28 U.S.C. § 1291. We review the district court's grant of summary judgment and its statutory interpretation *de novo*. *Dowling v. Davis*, 19 F.3d 445, 447 (9th Cir. 1994).

The False Claims Act enables a private individual to sue a firm which presents a fraudulent claim to the government. The action is brought in the name of the government, and is served on the government. The government can take over prosecution, which affects the size of the bounty the relator gets if the action succeeds. 31 U.S.C. § 3730. Before 1986, if the government did not elect to proceed with the action itself, the court had to dismiss the action if it was based on evidence the government already had when the lawsuit was filed:

> Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

31 U.S.C. § 3730(b)(4) (1982).

If this old law applies, then Mr. Anderson's *qui tam* action as to Northern Telecom's alleged pre-1986 false claims was properly dismissed, because "the action is based on evidence or information the Government had when the action was brought." Although the only reason the government had the information in 1990, when the action was brought, is that Mr. Anderson informed the FBI in 1988, the pre-1986 statutory bar operated even though the relator himself was the source of the information. *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 669 (9th Cir. 1978).

Congress changed the law in 1986. The old language barring recovery if the government had "information" before suit was filed was changed to an entirely new scheme, in which recovery was barred if the claim was based on "public disclosure," unless the relator was "an original source of the information." Here is the new statutory language at (e)(4), which entirely replaces the old subsection (b)(4) quoted above:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the *public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, *unless* the action is brought by the Attorney General or *the person bringing the action is an original source of the information.*
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4) (1988) (emphasis added).

Under this new provision, "public disclosure" rather than "information the Government had" bars the claim. *Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991). The claim is saved, despite "public disclosure," if the relator "is an original source." That means that the relator (1) has "direct and independent knowledge of the information on which his allegation is based," and (2) "has voluntarily provided the information to the Government before filing" his *qui tam* action. *Wang*, 975 F.2d at 1417, *citing* 31 U.S.C. § 3730(e)(4)(B). The relator does not have to prove that he is an "original source" unless there has been "public disclosure." *Id.*, *citing* 31 U.S.C. § 3730(e)(4)(A); *Hagood*, 929 F.2d at 1420.

The district court decided in the case at bar that the old law applied. The only analysis done was of whether "the action is based on evidence or information the Government had when the action was brought." No analysis was performed under the "public disclosure" and "original source" scheme of the new law, and the briefs do not discuss how the new law would apply to the evidence. Because we conclude that the new law should have been applied, we remand so that the district court can perform the analysis under it.

A. *Retroactivity.*

Statutes ordinarily do not operate retroactively, that is, to change the legal consequences of past conduct. An application is retroactive if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1505 (1994).

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would *impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.* If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 114 S. Ct. at 1505, emphasis added. *See also Murphy v. FDIC*, 38 F.3d 1490, 1501 (9th Cir. 1994) (en banc).

In *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), we applied the 1986 amendment to a case brought after 1986, where the disclosure to the government was made prior to 1986. We held that there was no "public disclosure" to serve as a bar to jurisdiction under 31 U.S.C. § 3730(e)(4)(A), so it did not matter whether the relator was an "original source" under § 3730(e)(4)(B). *See also Wang*, 975 F.2d at 1416. Although this appears to be a retroactive application of the 1986 amendment, we did not consider, discuss or decide the retroactivity issue in *Hagood*. The case came down before *Landgraf*, and the retroactivity issue was not raised by the parties.

The Sixth Circuit has held that the 1986 amendments to the False Claims Act do not apply retroactively. *United States v. TRW, Inc.*, 4 F.3d 417, 423 (6th Cir. 1993), *cert.*

denied, 114 S. Ct. 1370 (1994); *United States v. Murphy*, 937 F.2d 1032 (6th Cir. 1991). *TRW* (not *Murphy*) addressed the amendment at issue in this case. In *TRW*, the relator disclosed the false claim before the 1986 amendment saved him from the jurisdictional bar, while in the present case, the relator did not make his disclosure until after the amendment expanded jurisdiction. In the case at bar we do not reach the question of whether the amendment applies retroactively. We assume without deciding that the amendment is prospective in its effect, as the Sixth Circuit held.

The issue is, prospective to what? The Supreme Court has taught that the proper focus of retroactivity analysis is the conduct that would be affected by the law. *Landgraf*, 114 S. Ct. at 1505. Retroactive application of a law means that it changes the legal consequences of conduct that took place before the law went into effect. If, however, the law changes the legal consequences of conduct that takes place after the law goes into effect, the law operates on that conduct prospectively. That is, so long as Congress establishes the legal consequences of conduct prior to the conduct taking place, there is no issue of retroactivity. Congress presumptively tells people what to do in the future, but absent clear congressional intent, does not change the legal consequences of what they have done before it spoke. *Landgraf*, 114 S. Ct. at 1505.

In the case at bar, Northern Telecom submitted the allegedly false claims before the 1986 amendment became effective. But the 1986 amendment did not change the legal consequences of Northern Telecom's conduct. If Northern Telecom really did submit a fraudulent claim, it became liable and remained liable to the government and to potential *qui tam* relators. Congress changed the consequences of Mr. Anderson's conduct, not Northern Telecom's, in 1986. Had Mr. Anderson gone to the FBI with his information before

the 1986 amendment, his subsequent claim would have been barred by his own disclosure. *Pettis*, 577 F.2d at 669. After the amendment, his disclosure to the FBI did not bar his claim. Because Mr. Anderson acted after the amendment, and the amendment changed the consequences only of his conduct, application of the amendment to his conduct is prospective, not retroactive. *Cf. McGinnis v. Kentucky Fried Chicken of California*, 42 F.3d 1273, 1275 (9th Cir. 1994) (vacating punitive damages award because, although statute authorized punitive damages at the time of trial, it did not authorize them at the time KFC engaged in the wrongful conduct for which the punitive damages were awarded). Whether the amendment is retroactive or prospective only, Mr. Anderson's conduct took place after it, so benefited from the new law.

We conclude that the district court erred in dismissing Mr. Anderson's claims for lack of subject matter jurisdiction in reliance on the pre-1986 version of the False Claims Act. We remand the case so that the district court may decide upon the claims under the amended version of the Act.

B. ***Was summary judgment proper on the Letterkenny switch?***

The only switch as to which the district court reached the merits of the dispute was the one sold to Letterkenny Army Depot. Northern Telecom sent invoices to the Army for this switch in 1987 and 1989. Although the district court decided which law applied on the basis of when the claims were paid, we need not reach the question of whether the invoice date, the acceptance date or the payment date controls, because all dates relevant to the Letterkenny switch occurred after the 1986 law became effective.

The district court granted summary judgment in favor of Northern Telecom, because Mr. Anderson failed to establish

a genuine issue of material fact as to whether Northern Telecom submitted a false claim in violation of the statute. We review *de novo*, *Dowling*, 19 F.3d at 447, and affirm.

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims...." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). It is "not a disfavored procedural shortcut," but has replaced pre-1938 devices as the "principal tool[ ] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Id.* at 327. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine issue of material fact.*" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

> The judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. If the facts make a claim "implausible," the non-movant must present "more persuasive evidence than would otherwise be necessary" in order to defeat a summary judgment motion. *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988). Although the evidence must be viewed in a light most favorable to the opponent of the motion, and all reasonable inferences must be drawn in his favor, the inferences are limited to those upon

which a reasonable jury might return a verdict. *T.W. Elec. Svc., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987).

For a *qui tam* action to survive summary judgment, the relator must produce sufficient evidence to support an inference of knowing fraud. *Wang*, 975 F.2d at 1420. "The requisite intent is the knowing presentation of what is known to be false," as opposed to innocent mistake or mere negligence. *Hagood*, 929 F.2d at 1421. "Bad math is no fraud," proof of mistakes "is not evidence that one is a cheat," and "the common failings of engineers and other scientists are not culpable under the Act." *Wang*, 975 F.2d at 1420-21. The statutory phrase "known to be false" "does not mean 'scientifically untrue'; it means 'a lie.'" *Id.* at 1421.

The gist of Mr. Anderson's claim is that all the switches to which his lawsuit refers lacked proper grounding, so they would not work properly, and could be dangerous if certain parts were touched at certain times. The grounding on a number of switches was changed by a later enhancement, after deficiencies in performance were discovered. Grounding the switch better apparently reduced noise and hum, reduced the error rate in transmissions of digital data, and gave better protection and isolation to switch components.

Northern Telecom's senior electrical engineer on the project stated in his declaration that the Letterkenny switch was different from the others, and had the new grounding feature built in from the beginning. Mr. Anderson's evidence included a Northern Telecom internal document called "1987 Enhanced Grounding Schedule" which showed that something was planned for the Letterkenny switch in March 1987. Northern Telecom's engineer explained in his declaration that this was not the same grounding fix as was

needed on the older switches, but was a different and simpler change.

The engineer's declaration does not show that the Letterkenny switch had no defects. But Mr. Anderson's proof does not show any knowing presentation of a false or fraudulent claim. All it shows is that Northern Telecom's engineers built a switch that was not satisfactory, and after installing it, they fixed it. Regardless of whether presentation of a claim for payment for the inadequately grounded switch would have been a violation of the statute, the evidence does not show any such presentation. These are the relevant dates:

> Northern Telecom installs the Letterkenny switch--March 1986
>
> Northern Telecom fixes the ground--March 1987
>
> Army accepts the switch--October 1987, August 1989
>
> Northern Telecom bills Army--November 1987, August 1989
>
> Army pays Northern Telecom--December 1987, September 1989.

Basically, the switch was installed, it had bugs, the bugs were fixed, and then the vendor billed the Army and was paid. The Army and Northern Telecom discovered the problems in the switch when it was put into service in March of 1986. At that point, Northern Telecom began a year and a half of work to bring this and other switches up to a level of performance satisfactory to the Army. An October 31, 1986 Northern Telecom internal memorandum says "[t]he Letterkenny switch was cutover (in service) on March 14, 1986 with deficiencies," and "[s]ince that time, we have been endeavoring to get the issues resolved ... such that we can accomplish the ... acceptance test and get the Army to agree

to pay us." However, it took a long time to figure out whether the hum on the line was caused by fluorescent lights, the AC power supply, dirt, installation error, some aspect of the switches, or any number of other possibilities, and to figure out what to do about it.

Mr. Anderson offered no evidence to prove the contrary. He used the same materials outlined above to show that when the Letterkenny switch was installed, it was not as good as it should have been. But the *qui tam* action does not lie for the ordinary failings of engineers. It requires knowing presentation of a false or fraudulent claim. Mr. Anderson submitted affidavits of two people who worked on telecommunications purchases at different military bases, not Letterkenny Army Depot. Their bases received switches different from the Letterkenny switch. One said the Air Force "usually approved Northern Telecom's proposed testing procedures." The other said "if [Anderson's] allegations are true, I believe I should have been told." This evidence does not establish a genuine issue as to whether Northern Telecom knowingly presented a false claim for the Letterkenny Army Depot switch.

There is no direct evidence, and no evidence from which a jury could reasonably draw an inference, that Northern Telecom knowingly presented a false or fraudulent claim to the Army for the Letterkenny switch. There is evidence that, when installed, the Letterkenny switch did not work properly. But no reasonable jury could draw an inference of presentation of a false or fraudulent claim from that. The Army knew the switch was unsatisfactory, and expressed its dissatisfaction. There is no evidence in the record that Northern Telecom knowingly presented a false or fraudulent claim for the switch.

III. Conclusion

We reverse the district court's dismissal of Mr. Anderson's claims based on his disclosure to the FBI, and remand for further proceedings under the 1986 amendment. We affirm the district court's grant of summary judgment as to the Letterkenny Army Depot switch. The parties shall bear their own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, EX REL., THEODORE R. ANDERSON, Plaintiff, v. NORTHERN TELECOM, INC., Defendant.	NO. C90-231R ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT *[ENTERED APRIL 23, 1993]*

THIS MATTER comes before the court on defendant's motion for summary judgment. Having reviewed the motion together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. BACKGROUND

Theodore Anderson brings this action against defendant Northern Telecom, Inc. ("Northern Telecom") on behalf of the United States pursuant to the False Claims Act's qui tam provision. 31 U.S.C. § 3730. Mr. Anderson alleges that Northern Telecom submitted false claims to the Government in connection with its sale of digital telecommunications switches ("switches") to various military bases. Mr. Anderson generally alleges that Northern Telecom violated its contracts with the Government when its switches

did not conform to contract specifications due to grounding problems.

Northern Telecom now moves for summary judgment on the following grounds: First, Northern Telecom contends that this court lacks subject matter jurisdiction under the False Claims Act. Second, Northern Telecom denies any breach of contract with respect to switches supplied to military bases. Third, Northern Telecom alleges that Mr. Anderson has failed to raise a genuine issue regarding performance problems of Northern Telecom's switches. Finally, Northern Telecom contends that the False Claims Act is unconstitutional as applied to this qui tam action. The court addresses each issue in turn below.

II. DISCUSSION

A. Standard of Review on Summary Judgment.

On a motion for summary judgment, this court will look at the evidence in the light most favorable to the non-moving party, and determine whether there are any genuine issues of material fact which would require a jury or judge to resolve the parties' differing versions of the truth at trial. Sierra Club v. Penfold, 857 F.2d 1307, 1320 (9th Cir. 1988). If the nonmoving party will bear the burden of proof at trial on an essential element of its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact as to that element, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Moreover, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

B. Jurisdiction under the False Claims Act.

The False Claims Act was most recently amended in 1986. 31 U.S.C. §§ 3729-3731. That section of the amended statute which is at issue here concerns the court's qui tam jurisdiction. 31 U.S.C. § 3730(e)(4)(A). This section, as amended, provides in relevant part:

> "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations . . . in a hearing . . . or from the news media, unless the action is brought by the Attorney General **or the person bringing the action is an original source of the information.**"

31 U.S.C. § 3730(e)(4)(A) (emphasis added).

Under the pre-amended False Claims Act, an informer with direct knowledge of the fraud who reported the information to the government or to the news media prior to filing suit would have been jurisdictionally barred from bringing suit. See United States ex rel. Wisconsin Dept. of Health and Social Services v. Dean, 729 F.2d 1100, 1105 (7th Cir. 1984) (holding that federal courts are without subject matter jurisdiction where the suit is based upon information in the possession of the government at the time the suit was brought). The amendment of this section, by removing in part this jurisdictional bar, was intended to "encourage more private enforcement of suits." United States ex rel. La Valley v. First National Bank, 707 F. Supp. 1351, 1355 (D. Mass. 1988) (quoting S. Rep. 345 at 23-24, 99th Cong., 2nd Sess. 4, reprinted in 1986 U.S. Code Cong. & Admin. News pp. 5266, 5269).

The issue before the court is whether the 1986 jurisdictional amendment applies retroactively to the allegedly pre-amendment conduct giving rise to this action.[1]

1. Retroactive Versus Prospective Presumption.

The Supreme Court has articulated apparently inconsistent presumptions regarding the applicability of new enactments to pending cases (or, as in this case, to litigation begun post-enactment that concerns pre-enactment events). In Bradley v. School Board, 416 U.S. 696, 711 (1974), the Court held that "a Court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."

Later, in Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988), the Court held, without reference to its prior holding in Bradley, that: "retroactivity is not favored in the law . . . Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Even three years prior to Bowen, the Court had qualified Bradley, and reasoned that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." Bennett v. New Jersey, 470 U.S. 632, 638-39 (1985) (declining to give retroactive application to changes under Title I to the substantive requirements for federal grants).

Then in Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 837 (1990), the Court noted that its views on

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[1] The parties dispute whether all the conduct at issue occurred prior to the 1986 Amendments. The court addresses this issue below.

retroactivity expressed in Bradley and Bowen were in "apparent tension." The Court did not, however, resolve this tension in Kaiser Aluminum because it found that under either the Bradley or Bowen presumption, "where congressional intent is clear, it governs." Finding a clear congressional intent that the statute at issue was to be applied prospectively, the Court declined to reconcile Bradley and Bowen.

Despite the many differences in reasoning and results among courts that have considered the retroactivity of the 1986 Amendments to the Fair Claims Act, there is complete agreement that neither its plain language nor its legislative history provide any guidance on whether the Amendments were intended to be applied prospectively or retroactively. See, e.g., United States ex rel. McCoy v. California Medical Review, Inc., 723 F. Supp. 1363, 1367 (N.D. Cal. 1989); United States v. Murphy, 937 F.2d 1032, 1037 (6th Cir. 1991); United States ex rel. La Valley v. First National Bank, 707 F. Supp. 1351, 1359 (D. Mass. 1988).

Thus, without the guidance of legislative intent and against this backdrop of conflicting Supreme Court precedent, this court must look to the Ninth Circuit for direction. Compare Estate of Reynolds v. Martin, 61 U.S.L.W. 2488 (9th Cir. Feb. 9, 1993) (No. 91-15237) (declining to address the conflict between Bradley and Bowan [sic], but rather holding that the plain language of the Civil Rights Act of 1991 dictates retroactive application of the Act).

2. Ninth Circuit Treatment of Retroactivity.

In 1985, the Ninth Circuit noted that the Bradley presumption of retroactivity applied equally to "changes in the law that affect jurisdiction." In re Rubin, 769 F.2d 611, 614 (9th Cir. 1985). In 1989, after the Supreme Court's decision in Bowen, the Ninth Circuit considered whether a

provision of the Judicial Improvements and Access to Justice Act of 1988, which expanded the court's jurisdiction upon removal of a case under the Act, should be applied retroactively. Kruso v. International Telephone & Telegraph Corp., 872 F.2d 1416, 1424 (9th Cir. 1989), cert. denied, 496 U.S. 937 (1990).

The court noted the lack of clear congressional intent, and then considered whether the jurisdictional provision was "addressed to remedies or procedures . . . [or whether it] otherwise alter[ed] substantive rights." Id., (quoting Friel v. Cessna Aircraft Co., 751 F.2d 1037, 1039 (9th Cir. 1985)). Finding that the expansion of the court's removal jurisdiction was a "procedural enactment which [did] not alter substantive rights," the Ninth Circuit applied the Bradley presumption, and held that the enactment applied retroactively. Kruso, 872 F.2d at 1425.

The Ninth Circuit applied this analysis again in Delta Computer Corp. v. Samsung Semiconductor & Telecommunications Co., 879 F.2d 662, 663 (9th Cir. 1989). In Delta, the Ninth Circuit held that an amended section of the Federal Arbitration Act applied retroactively to limit its jurisdiction to hear an interlocutory appeal of an order compelling arbitration. The court found that the amendment's limitation of its appellate jurisdiction did "not infringe upon or deprive [the parties] of any mature or unconditional right." Id. at 664.

Thus, the Ninth Circuit directs that the Bradley presumption of retroactivity applies only "when a statute is addressed to remedies and procedures and does not otherwise alter substantive rights." Lee v. Sullivan, 787 F. Supp. 921, 931 (N.D. Cal. 1992) (quoting Friel v. Cessna Aircraft Co., 751 F.2d 1037, 1039 (9th Cir. 1985)).

3. Application of the Ninth Circuit's "Substantive Rights" Test to the 1986 Amendments to the False Claims Act.

Defendant Northern Telecom cites United States v. Murphy, 937 F.2d 1032, 1038 (6th Cir. 1991) for the proposition that the 1986 Amendments affect substantive rights, and should not therefore be subject to the Bradley presumption of retroactivity. Murphy considered the 1986 Amendment that changed the definition of "knowingly" within the statute, thereby subjecting to liability conduct which the Sixth Circuit would not have previously viewed as violating the Act; and also considered the Amendment that increased the potential liability of the defendant in that case by more than $1,000,000. 937 F.2d at 1036, 1038.

Reasoning that "the phrase 'substantive rights and liabilities' must be construed broadly," Murphy held that the 1986 Amendments affected the defendant's substantive rights by enlarging the scope of his potential liability. Id. at 1038.

Murphy, as the only Court of Appeals decision considering retroactivity of the 1986 False Claims Act Amendments, is entitled to substantial weight. See United States ex rel. Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624, 628-629 (N.D. Ill. 1992) (holding that the 1986 Amendments have only prospective application under Murphy). Hartigan squarely addressed the question of whether the jurisdictional amendment to the False Claims Act should be given retroactive application, and applied a similar "substantive rights" analysis adopted by the Seventh Circuit. 797 F. Supp. at 628 (citing Mozee v. American Commercial Marine Service Co., 963 F.2d 929, 936-37 (7th Cir. 1992) (holding that the Bowen presumption of prospective application controls where the amendments involved "substantive provisions" of the statute)). Hartigan, following Murphy, concluded that the 1986 jurisdictional amendment

affected the "substantive rights" of the defendant, and should only be applied prospectively. 797 F. Supp. at 629.

Applying the Ninth Circuit's "substantive rights" test, this court also concludes that Murphy must control in this instance. The jurisdictional amendment at issue, 31 U.S.C. § 3730(e)(4), is not limited to purely procedural considerations such as the timing of appellate review at issue in Delta, 879 F.2d at 663; or, whether naming "John Doe" defendants defeats diversity jurisdiction for the purposes of removal at issue in Kruso, 872 F.2d at 1424. These cases exemplify the kind of "procedural enactment" intended to be given retroactive effect under the Ninth Circuit's "substantial rights" test.[2]

In contrast, the jurisdictional amendment at issue here broadens the scope of defendant's exposure to liability, by permitting claims that would have been precluded under the False Claims Act prior to its amendment in 1986. This

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[2] Similarly, Mr. Anderson's reliance on Federal Deposit Ins. Corp. v. New Hampshire Ins. Co., 953 F.2d 478, 485 (9th Cir. 1991) also supports this reasoning. In New Hampshire, the Ninth Circuit considered whether to apply retroactively the amended statute of limitations period in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821(d)(14)(A)(i). The court found no clear indication of congressional intent, and so looked to whether the amendment was "procedural in nature" or whether it would "affect substantive rights." New Hampshire, 953 F.2d at 487. Concluding that a statute of limitations period is typically considered to be procedural in nature, the court held that the amendment must be accorded retroactive effect. Id. The jurisdictional amendment at issue here, unlike an amendment to a statute of limitations, is not typically presumed procedural.

follows precisely the reasoning of the Murphy court, which held that the 1986 Amendments must be applied prospectively only because they "create a new liability in connection with a past transaction." 937 F.2d at 1038 (quoting United States v. Bekhrad, 672 F. Supp. 1529, 1530 (S.D. Iowa 1987)). The court therefore holds that the 1986 Amendments to the False Claims Act have only prospective effect, and will not be applied to claims that were completed before October 27, 1986, the date on which the Amendments took effect.[3]

4. Date Claims Completed.

A "claim" under the False Claims Act is not "completed" until the Government has paid the amount due. United States ex rel. Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624, 629 (N.D. Ill. 1992) ("a claim is not complete before the 'last date when the Government paid any money on a particular claim'") (quoting United States v. Klein, 230 F. Supp. 426, 442 (W.D. Pa. 1964), aff'd, 356 F.2d 983 (3rd Cir. 1966)); see also Blusal Meats, Inc. v. United States, 638 F. Supp. 824, 829 (S.D.N.Y. 1986) (holding that the six-year limitations period under the False Claims Act begins to run on the claim's date of payment); and, United States ex rel. Duvall v. Scott Aviation, 733 F. Supp. 159, 161 (W.D.N.Y. 1990)

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[3] The court does not find persuasive Mr. Anderson's citation of United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991). Although some of the conduct at issue in the case had occurred in 1982, and the Ninth Circuit did apply the False Claims Act as amended in 1986, the court did not specifically address the issue of retroactive application, and there was no evidence before the court that the claims at issue had been completed by October 27, 1986.

(holding that the "date of payment and not the request" for payment triggers the statute of limitations).[4]

Dolores Petershack was one of the Northern Telecom employees responsible for maintaining the receivable files and payment records in connection with the "switches" at issue in this case. Defendant's Exhibit 3, Declaration of Dolores Petershack, ¶ 2. From these files, she compiled the following information for the "switch" at each site: invoice number, invoice date, Government acceptance date; shipment number, invoice amount, date of receipt of the Government's check; Government check number; and, the amount received from the Government. Id., ¶ 5. The compilation of this data shows that, with the exception of claims relating to the switch at Letterkenny Army Depot, all claims were paid before October 27, 1986. See, Attachment to Defendant's Exhibit 3, at 1-4.

Mr. Anderson attempts to refute this evidence by submitting an apparently random selection of invoice copies as Relator's Exhibits 4-9. Of the nineteen invoice copies submitted to the court by Mr. Anderson, however, only three are dated after October 27, 1986. See Relator's Exhibits 4-9. Of these three, one relates to the switch at the Letterkenny Army Depot (Relator's Exhibit 9), and the other two bear no indication of how -- if at all -- they relate to Mr. Anderson's allegations of defective grounding (Relator's Exhibit 5, at 1, 4).

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[4] In its Amicus Brief, the United States does not cite, nor has the court found, any support for its contention that Relator Ted Anderson's cooperation with the Government's investigation, rather than the Government's payment on the claims, determines whether the claims were complete prior to October 27, 1986.

The court finds that Mr. Anderson has failed to make a showing sufficient to establish a genuine dispute of fact as to the date the claims were completed. On these grounds, the court determines that, with the exception of claims relating to the Letterkenny Army Depot switch, the allegedly false claims were paid by the Government prior to October 27, 1986. Thus, the claims at issue were completed prior to the 1986 Amendments to the False Claims Act, and being applied prospectively only, the amended statute does not control in this matter.

The parties do not dispute that Mr. Anderson presented the information upon which his False Claims Act allegations are based to the Government in July of 1988 -- one and one-half years before this action was filed. See Declaration of Ted Anderson, ¶ 5. Under the pre-amended False Claims Act, an informer with direct knowledge of the fraud who reported the information to the government prior to commencing an action is jurisdictionally barred from bringing suit. See United States ex rel. Wisconsin Dept. of Health and Social Services v. Dean, 729 F.2d 1100, 1105 (7th Cir. 1984) (holding that federal courts are without subject matter jurisdiction where the suit is based upon information in the possession of the government at the time the suit was brought). Mr. Anderson's claims with respect to all switches except the Letterkenny Army Depot switch are therefore dismissed for lack of subject matter jurisdiction.

C. The Letterkenny Army Depot Switch.

As discussed above, the parties do not dispute that claims for the Letterkenny Army Depot switch (the "Letterkenny" switch) were paid after October 27, 1986. See, Attachment to Defendant's Exhibit 3, at 1-4. The 1986 Amendments to the False Claims Act therefore apply to Mr. Anderson's claims regarding this switch, and the court now addresses the

merits of Mr. Anderson's false claim allegations with respect to Letterkenny.

All of Mr. Anderson's false claim allegations relate to the grounding deficiencies of a particular kind of switch known as the "SL-100" switch, a version of which is also called the "DMS-100" switch. These SL-100 and DMS-100 switches are generally alleged to have been subject to grounding problems as a result of Northern Telecom's failure to utilize a "single point ground" system. See Declaration of Thomas Seim Re: Expert Report, Attached Expert Report, at 7. Mr. Anderson alleges that this general grounding defect resulted in the following violations of the SL-100 contract specifications: (1) a digital bit error rate of more 10^{-8}; (2) failure to provide "inherent availability" of "at least 0.99996;" and, (3) a resulting failure to provide a "commercially available state of the art digital telecommunications system." See Relator's Exhibit 11, "AFCC Engineering and Performance Specifications for SCOPE DIAL Digital Telecommunications System," at 46, § 3.3.10.15; at 13, § 3.2.16.2; and, at 5, § 3.

Mr. Anderson does not dispute that when Northern Telecom "repaired" or "enhanced" its SL-100 switches throughout 1987 with an "isolated system grounding" (ISG) technology -- at no cost to the Government -- these alleged grounding deficiencies disappeared. Indeed, Mr. Anderson presents no evidence to the contrary, and Mr. Anderson's own experts apparently concede that this "grounding enhancement" was a solution to the deficiencies they describe.

See, e.g. Declaration of Thomas Seim Re: Expert Report, Attached Expert Report, at 7-8, 17-19; Declaration of Warren Lewis Re: Expert Report, Attached Expert Report, at 13-16.

Every switch at issue here except the Letterkenny switch was sold to the military under a government contract called the "SCOPE DIAL" contract. The Letterkenny switch was sold under the "CONUS 84-85" contract, which provided the Army with a SL-100 "packaged" switch, as opposed to the SL-100 "custom" switch provided under the SCOPE DIAL contract. Defendant's Exhibit 1, Declaration of Foster N. Dickson, ¶ 7.

Mr. Murray Gold was the principal engineer responsible for designing the entire system configuration and grounding arrangements for that switch. Defendant's Exhibit 4, Declaration of Murray S. Gold, ¶ 3. Mr. Gold states that the SL-100 "packaged" switch installed at Letterkenny was designed with an isolated grounding system from its inception. Id., ¶ 5. This means that once a single lead was moved in order to reference the logic ground to the battery return, the SL-100 "packaged" switch installed at Letterkenny was completely consistent with the final, "ISG enhanced" SL-100 "custom" switch. Id., ¶ 5. In summary, the SL-100 switch at Letterkenny had the "ISG" grounding features incorporated into its original design. Thus, the court finds no support in the record for Mr. Anderson's false claim allegations against Letterkenny. Having thus failed to establish a genuine dispute of fact regarding the alleged grounding deficiencies, the court grants defendant's motion for summary judgment with respect to the Letterkenny switch.

D. Constitutionality of the False Claims Act.

Northern Telecom contends that the False Claims Act's qui tam provisions are unconstitutional. Congressional enactments, however, are presumptively valid against challenges for constitutional infirmities. Fullilove v. Klutznick, 448 U.S. 448, 472 (1980). Because the court has disposed of Northern Telecom's motion for summary

judgment on other grounds, the court declines to reach Northern Telecom's constitutional challenge to the False Claims Act.

In addition, the court declines to grant the parties' request for oral argument on the grounds that it is unnecessary. The parties had ample opportunity to provide the court with evidence and legal argument in support of, and in opposition to this motion. See Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corp., 933 F.2d 724, 728-729 (9th Cir. 1991), cert. denied, 112 S. Ct. 1295 (1992).

It is hereby ORDERED, ADJUDGED, and DECREED that:

(1) Relator Ted Anderson's claims with respect to all the SCOPE DIAL switches are DISMISSED for lack of subject matter jurisdiction;

(2) defendant Northern Telecom's motion for summary judgment is GRANTED with respect to the Letterkenny Army Depot switch;

(3) the United States is permitted twenty (20) days from the date of this Order to move to reopen and intervene in this action, and by such intervention seek to cure the jurisdictional defect under former 31 U.S.C. § 3730(e)(4);

(4) Relator Anderson's motion for an order confirming jury trial is STRICKEN as moot; and

(5) the court declines to hear oral argument on this motion.

DATED at Seattle, Washington this 23rd day of April, 1993.

/s/

BARBARA J. ROTHSTEIN
CHIEF UNITED STATES
DISTRICT JUDGE

United States District Court

WESTERN DISTRICT OF WASHINGTON
At Seattle

UNITED STATES OF AMERICA,
ex rel. THEODORE R. ANDERSON,
Plaintiff

JUDGMENT IN A CIVIL CASE

v.

NORTHERN TELECOM, INC.,
Defendant.

CASE NUMBER: C90-231R

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial for hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

(1) Relator Ted Anderson's claim with respect to all the SCOPE DIAL switches are DISMISSED for lack of subject matter jurisdiction;

(2) defendant Northern Telecom's motion for summary judgment is GRANTED with respect to the Letterkenny Army Depot switch;

(3) the United States is permitted 20 days from this date to move to reopen and intervene in this action and by such intervention seek to cure the jurisdictional defect under former 31 U.S.C. § 3730(e)(4);

(4) Relator Anderson's motion for an order confirming jury trial is STRICKEN as moot; and

(5) the court declines to hear oral argument on this motion.

23 April 1993
Date

BRUCE RIFKIN
Clerk

/s/

(By) Deputy Clerk Elizabeth Tyree

APPENDIX C

FILED
June 22, 1995
Cathy A. Catterson, Clerk
U. S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel. THEODORE R. ANDERSON, Plaintiff-Appellant, v. NORTHERN TELECOM, INC., Defendant-Appellee.	No. 93-35520 D.C. NO. C90-231R ORDER

Before: ALARCÓN, BEEZER and KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Beezer and Judge Kleinfeld vote to reject the suggestion for rehearing en banc, and Judge Alarcón so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

FILED
July 26, 1995
Cathy A. Catterson, Clerk
U. S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel. THEODORE R. ANDERSON, Plaintiff-Appellant, v. NORTHERN TELECOM, INC., Defendant-Appellee.	No. 93-35520 D.C. No.CV-90-231-BJR ORDER

Before: ALARCÓN, BEEZER and KLEINFELD, Circuit Judges.

Appellant's "motion to accept motion for filing of the petition for rehearing and recall of the mandate" is hereby DENIED.

APPENDIX E

FALSE CLAIMS ACT
31 U.S.C. §§ 3729-3731 (1982)

§ 3729. False claims

A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person --

(1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an armed force a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of public property or money used, or to be used, in an armed force and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used,

or to be used, in an armed force and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; or

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from a member of an armed force who lawfully may not sell or pledge the property.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 978.)

§ 3730. Civil actions for false claims

(a) The Attorney General diligently shall investigate a violation under section 3729 of this title. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person. The person may be arrested and bail set for an amount of not more than $2,000 and 2 times the amount of damages sworn to in an affidavit of the Attorney General.

(b) (1) A person may bring a civil action for a violation of section 3729 of this title for the person and for the United States Government. The action shall be brought in the name of the Government. The district courts of the United States have jurisdiction of the action. Trial is in the judicial district within whose jurisdictional limits the person charged with a violation is found or the violation occurs. An action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government under rule 4 of the Federal Rules of Civil Procedure (28 App. U.S.C.). The

Government may proceed with the action by entering an appearance by the 60th day after being notified. The person bringing the action may proceed with the action if the Government --

(A) by the end of the 60-day period does not enter, or gives written notice to the court of intent not to enter, the action; or

(B) does not proceed with the action with reasonable diligence within 6 months after entering an appearance, or within additional time the court allows after notice.

(3) If the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by an act of the person bringing the action.

(4) Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

(c)(1) If the Government proceeds with the action, the person bringing the action may receive an amount the court decides is reasonable for disclosing evidence or information the Government did not have when the action was brought. The amount may not be more than 10 percent of the proceeds of the action or settlement of a claim and shall be paid out of those proceeds.

(2) If the Government does not proceed with an action, the person bringing the action or settling the claim may receive an amount the court decides is reasonable for collecting the civil penalty and damages. The amount may not be more than 25 percent of the proceeds of the action or settlement and shall be paid out of those proceeds. The

person may also receive an amount for reasonable expenses the court finds to have been necessarily incurred and costs awarded against the defendant.

(d) The Government is not liable for expenses a person incurs in bringing an action under this section.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 978.)

§ 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 979.)

APPENDIX F

Pub. L. No. 99-562, 99th Cong., 2d. Sess.,
100 Stat. 3153-3169 (October 27, 1986)

FALSE CLAIMS AMENDMENTS ACT OF 1986

An Act to amend title 31, United States Code, with respect to the fraudulent use of public property or money.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "False Claims Amendments Act of 1986".

SEC. 2. FALSE CLAIMS.

Section 3729 of title 31, United States Code, is amended --

(1) by striking the matter preceding paragraph (1) and inserting the following:

"(a) LIABILITY FOR CERTAIN ACTS. -- Any person who --";

(2) in paragraph (1) by striking "Government or a member of an armed force" and inserting "United States Government or a member of the Armed Forces of the United States";

(3) in paragraph (2) by inserting "by the Government" after "approved";

(4) in paragraph (4) --

(A) by striking "public"; and

(B) by striking "in an armed force" and inserting "by the Government";

(5) in paragraph (5) --

(A) by striking "in an armed force" and inserting "by the Government"; and

(B) by striking "or" after the semicolon;

(6) in paragraph (6) --

(A) by striking "a member of an armed force" and inserting "an officer or employee of the Government, or a member of the Armed Forces,"; and

(B) by striking the period at the end of the paragraph and inserting"; or"; and

(7) by adding at the end of the subsection the following:

"(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains

because of the act of that person, except that if the court finds that --

"(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

"(B) such person fully cooperated with any Government investigation of such violation; and

"(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

"(b) KNOWING AND KNOWINGLY DEFINED. -- For purposes of this section, the terms 'knowing' and 'knowingly' mean that a person, with respect to information --

"(1) has actual knowledge of the information;

"(2) acts in deliberate ignorance of the truth or falsity of the information; or

"(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

"(c) CLAIM DEFINED. -- For purposes of this section, 'claim' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

"(d) EXEMPTION FROM DISCLOSURE. -- Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

"(e) EXCLUSION. -- This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954.".

SEC. 3. CIVIL ACTIONS FOR FALSE CLAIMS.

Section 3730 of title 31, United States Code, is amended to read as follows:

"§ 3730. Civil actions for false claims

"(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL. -- The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

"(b) ACTIONS BY PRIVATE PERSONS. -- (1) A person may bring a civil action for a violation of section 3729

for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

"(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and infrmation.

"(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

"(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

> "(A) proceed with the action, in which case the action shall be conducted by the Government; or
>
> "(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

"(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

"(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS. -- (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

"(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

"(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

"(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as --

"(i) limiting the number of witnesses the person may call;

"(ii) limiting the length of the testimony of such witnesses;

"(iii) limiting the person's cross-examination of witnesses; or

"(iv) otherwise limiting the participation by the person in the litigation.

"(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

"(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause."

"(4) Whether or not the Government proceeds with action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence

and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

"(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

"(d) AWARD TO QUI TAM PLAINTIFF. -- (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the

significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

"(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

"(3) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the actions was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

"(e) CERTAIN ACTIONS BARRED. -- (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

"(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress,

a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

"(B) For purposes of this paragraph, 'senior executive branch official' means any officer or employee listed in section 201(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

"(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

"(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

"(B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

"(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES. -- The Government is not liable for expenses which a person incurs in bringing an action under this section.

"(g) FEES AND EXPENSES TO PREVAILING DEFENDANT. -- In civil actions brought under this section

by the United States, the provisions of section 2412(d) of title 28 shall apply.".

SEC. 4. ENTITLEMENT TO RELIEF FOR DISCRIMINATION BY EMPLOYERS AGAINST EMPLOYEES WHO REPORT VIOLATIONS.

Section 3730 of title 31, United States Code, as amended by section 3 of this Act, is further amended by adding at the end the following new subsection:

"(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.".

SEC. 5. FALSE CLAIMS PROCEDURE.

Section 3731 of title 31, United States Code, is amended by striking subsection (b) and inserting the following:

"(b) A civil action under section 3730 may not be brought --

"(1) more than 6 years after the date on which the violation of section 3729 is committed, or

"(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

"(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

"(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.".

SEC. 6. FALSE CLAIMS JURISDICTION; CIVIL INVESTIGATIVE DEMANDS.

(a) IN GENERAL. -- Subchapter III of chapter 37 of title 31, United States Code, is amended by adding at the end the following new sections:

"§ 3732. False claims jurisdiction

"(a) ACTIONS UNDER SECTION 3730. -- Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

"(b) CLAIMS UNDER STATE LAW. -- The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

§ 3733. Civil investigative demands

"(a) IN GENERAL. --

"(1) ISSUANCE AND SERVICE. -- Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person --

"(A) to produce such documentary material for inspection and copying,

"(B) to answer in writing written interrogatories with respect to such documentary material or information,

"(C) to give oral testimony concerning such documentary material or information, or

"(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

"(2) CONTENTS AND DEADLINES. --

"(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

"(B) If such demand is for the production of documentary material, the demand shall --

"(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

"(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

"(iii) identify the false claims law investigator to whom such material shall be made available.

"(C) If such demand is for answers to written interrogatories, the demand shall --

"(i) set forth with specificity the written interrogatories to be answered;

"(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

"(iii) identify the false claims law investigator to whom such answers shall be submitted.

"(D) If such demand is for the giving of oral testimony, the demand shall --

"(i) prescribe a date, time, and place at which oral testimony shall be commenced;

"(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

"(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

"(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

"(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

"(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

"(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

"(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or

agency, of any function vested in the Attorney General under this subparagraph.

"(b) PROTECTED MATERIAL OR INFORMATION. --

"(1) IN GENERAL. -- A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under --

"(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

"(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

"(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS. -- Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

"(c) SERVICE; JURISDICTION. --

"(1) BY WHOM SERVED. -- Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

"(2) SERVICE IN FOREIGN COUNTRIES. -- Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

"(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS. --

"(1) LEGAL ENTITIES. -- Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by --

> "(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

"(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

"(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

"(2) NATURAL PERSONS. -- Service of any such demand or petition may be made upon any natural person by --

"(A) delivering an executed copy of such demand or petition to the person; or

"(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

"(e) PROOF OF SERVICE. -- A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

"(f) DOCUMENTARY MATERIAL. --

"(1) SWORN CERTIFICATES. -- The production of documentary material in response to a civil investigative

demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by --

"(A) in the case of a natural person, the person to whom the demand is directed, or

"(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

"(2) PRODUCTION OF MATERIALS. -- Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

"(g) INTERROGATORIES. -- Each interrogatory in a civil investigative demand served under this section shall be

answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by --

"(1) in the case of a natural person, the person to whom the demand is directed, or

"(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

"(h) ORAL EXAMINATIONS. --

"(1) PROCEDURES. -- The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not

preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

"(2) PERSONS PRESENT. -- The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

"(3) WHERE TESTIMONY TAKEN. -- The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

"(4) TRANSCRIPT OF TESTIMONY. -- When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to

sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

"(5) CERTIFICATION AND DELIVERY TO CUSTODIAN. -- The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

"(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS. -- Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

"(7) CONDUCT OF ORAL TESTIMONY. -- (A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or

privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

"(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

"(8) WITNESS FEES AND ALLOWANCES. -- Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

"(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.--

"(1) DESIGNATION. -- The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

"(2) RESPONSIBILITY FOR MATERIALS; DISCL0SURE. -- (A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian

shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

"(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

"(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of

the information by such agency in furtherance of its statutory responsibilities.

"(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe --

"(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

"(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

"(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS. -- Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

"(4) CONDITIONS FOR RETURN OF MATERIAL. -- If any documentary material has been produced by any

person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and--

"(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

"(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

"(5) APPOINTMENT OF SUCCESSOR CUSTODIANS. -- In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly --

"(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

"(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

"(j) JUDICIAL PROCEEDINGS. --

"(1) PETITION FOR ENFORCEMENT. -- Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

"(2) PETITION TO MODIFY OR SET ASIDE DEMAND. -- (A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an

order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed --

> "(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or
>
> "(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

"(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

"(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY. -- (A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which

such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed --

> "(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or
>
> "(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

"(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

"(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES. -- At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within

which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

"(5) JURISDICTION. -- Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

"(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE. -- The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

"(k) DISCLOSURE EXEMPTION. -- Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

"(l) DEFINITIONS. -- For purposes of this section --

"(1) the term 'false claims law' means --

"(A) this section and sections 3729 through 3732; and

"(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United

States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

"(2) the term 'false claims law investigation' means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

"(3) the term 'false claims law investigator' means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

"(4) the term 'person' means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

"(5) the term 'documentary material' includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

"(6) the term 'custodian' means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

"(7) the term 'product of discovery' includes --

"(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

"(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

"(C) any index or other manner of access to any item listed in subparagraph (A).".

(b) CLERICAL AMENDMENT. -- The table of contents for chapter 37 of title 31, United States Code, is amended by adding after the item relating to section 3731 the following:

SEC. 7. CRIMINAL PENALTIES.

Section 287 of title 18, United States Code, is amended by striking "fined" and all that follows through "both" and inserting "imprisonment not more than five years and shall be subject to a fine in the amount provided in this title".

Approved October 27, 1986.

Supreme Court, U.S.
FILED
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No. 95-471

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORTHERN TELECOM INC.,
a Delaware corporation,

Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.*
THEODORE R. ANDERSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AND THE ELECTRONIC INDUSTRIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NORTHERN TELECOM'S PETITION FOR CERTIORARI

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BRIEF OF AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AND THE ELECTRONIC INDUSTRIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NORTHERN TELECOM'S PETITION FOR CERTIORARI

Aerospace Industries Association of America, Inc. and the Electronic Industries Association, as *amici curiae* pursuant to Supreme Court Rule 37.2, urge that the Court

grant Northern Telecom's petition for a writ of certiorari filed in this case.

This *amici curiae* brief is filed with the consent of both Petitioner, Northern Telecom Inc., and Respondent, Theodore R. Anderson.

I

AMICI CURIAE REPRESENT MANY OF THE LARGEST COMPANIES IN THE UNITED STATES, MOST OF WHOM ENGAGE IN SUBSTANTIAL SALES OF PRODUCTS AND SERVICES TO THE UNITED STATES GOVERNMENT IN TRANSACTIONS SUBJECT TO THE FALSE CLAIMS ACT.

Aerospace Industries Association of America, Inc. ("AIA") is a national, non-profit trade association representing the nation's manufacturers of commercial, military and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment. AIA is comprised of forty-nine member companies, including many of the nation's largest corporations.

Virtually all of AIA's member companies provide goods and services under contract to the Federal Government, with many of the member companies deriving a significant portion of their business from those contracts. Many AIA members, therefore, are potentially exposed to claims under the False Claims Act, 31 U.S.C. §§ 3729-3733 (the "Act"). Since 1986, AIA members have been named in over sixty actions under the Act, and AIA members are currently involved in over thirty *qui tam* actions brought under the Act. More than three and one-half billion dollars are claimed as damages in pending cases against AIA members involving the issue of whether the 1986 False Claims Amendments Act, Pub. L. No. 99-563, 100 Stat. 3158 (the "1986 Amendments"), in whole or in part, is to be applied retroactively. Therefore, the issues of retroactivity presented in this case are of substantial importance to AIA and its members.

The Electronic Industries Association ("EIA") is a national organization of more than twelve hundred companies involved in the development and production of televisions, radios, computers, telecommunications devices, radars, avionics, and other military and commercial electronic equipment. Many of its members derive revenue from sales to the United States Department of Defense and other Government agencies. One role of EIA is to serve as a spokesman for the dissemination of its members' views on important Government procurement issues.

The members of EIA who contract with the Federal Government are exposed to claims under the Act. A number of EIA's members have had to defend False Claims Act allegations or are currently defending such allegations, including cases involving the retroactivity of the 1986 Amendments.

The members of AIA and EIA are thus directly affected by whether any provisions of the 1986 Amendments apply to pre-enactment conduct.

II

GRANTING CERTIORARI IN THIS CASE WILL RESOLVE LEGAL ISSUES OF CRITICAL IMPORTANCE TO *AMICI* AND OTHER GOVERNMENT CONTRACTORS.

The conflict among the circuits concerning the retroactive effect of the 1986 Amendments warrants review by this Court in order to clarify the effect of those Amendments; to establish when a statute is one indivisible unit for retroactivity purposes; and to explain when statutes that are jurisdictional or procedural in form, but alter substantive rights, may be applied retroactively.

The Act is the principal statutory basis used by the Government and by *qui tam* relators to allege fraud by government contractors. Government contractors across the

country face unwarranted uncertainty under the Act because lower courts disagree as to how the Act applies to pre-1986 conduct. A decision by this Court clarifying whether the Act applies to pre-1986 contractor conduct will provide guidance to existing and potential defendants, discourage forum shopping by *qui tam* plaintiffs, resolve an important issue that is pending in the lower federal courts, and significantly assist all courts in their analysis of retroactivity issues.

The problem of whether any provisions of the 1986 Amendments may be applied to pre-enactment conduct, without having an impermissible retroactive effect, arises in many contexts and remains an important issue for the federal courts. The following cases, some involving members of *amici*, illustrate the variety of circumstances in which this problem is presented and is still pending in the lower federal courts.

1. ***Hyatt v. Northrop Corp.***, Nos. 94-55638, 94-55578 (9th Cir.) (pending). In *Hyatt*, the Government acquired the information pleaded in the *qui tam* complaint and the relator filed the *qui tam* action before Congress enacted the 1986 Amendments. The *qui tam* relator alleges that Northrop submitted false claims in violation of the Act in connection with the design, development, and manufacture of the MX Peacekeeper missile program. The Government investigated the relator's allegations, declined to intervene, and recommended that the court dismiss the *qui tam* action because of the Government's prior knowledge. The district court dismissed the *qui tam* claims. In a pending appeal, the *qui tam* relator relies on recent decisions from the Ninth Circuit in seeking to revive his *qui tam* claims and asserts a claim for reinstatement under the 1986 Amendments' new whistleblower remedy. The Ninth Circuit heard oral argument in September 1995 but has not yet released any decision.

2. ***United States ex rel. Haycock v. Hughes Aircraft Company***, Nos. 94-55620 & 94-55826 (9th Cir.) (pending). In *Haycock*, the *qui tam* relator alleged that, between 1983 and 1987, Hughes Aircraft Company violated the Act by charging the labor hours of certain employees working in Hughes' Systems Engineering Laboratory to direct cost-pool accounts rather than to indirect or overhead accounts. Hughes filed concurrently (1) a motion to dismiss portions of the complaint based, in part, on the pre-1986 statute of limitations in the Act and (2) a motion for summary judgment. The district court granted Hughes' motion for summary judgment and, therefore, declined to rule on the retroactivity issue raised in Hughes' motion to dismiss. The relator appealed the district court's decision granting summary judgment. On September 15, 1995, the Ninth Circuit heard oral argument, but has not yet issued a decision. If the district court's ruling is reversed, it will be forced to address the retroactivity issue.

3. ***United States ex rel. Lindenthal v. General Dynamics Corp.***, 61 F.3d 1402 (9th Cir. 1995). The relator alleged *qui tam* claims against General Dynamics arising from the design of the MUTES system, which the Air Force uses to train pilots. The district court found that the Government had knowledge forming the basis for the claim before the 1986 Amendments, but applied the 1986 Amendments to preserve the relator's claims. It found in favor of General Dynamics at the trial and awarded costs in favor of General Dynamics. The Ninth Circuit affirmed. On October 4, 1995, it denied the relator's petition for rehearing and suggestion of rehearing en banc. A petition for certiorari may be filed in this case.

4. ***United States ex rel. Schumer v. Hughes Aircraft Company***, 63 F.3d 1512 (9th Cir. 1995). In *Schumer*, the *qui tam* relator alleged that Hughes Aircraft made false claims in connection with programs for the development of radar

systems for the F-14, F-15, F-18, and B-2 aircraft for the Air Force. The allegedly false claims were submitted before 1986 and the Government was aware of the allegations on which the *qui tam* action was based before Congress passed the 1986 Amendments. The relator filed his lawsuit in 1989. The district court applied the 1986 Amendments to these claims and the Ninth Circuit affirmed that ruling on August 2, 1995. Hughes Aircraft's petition for rehearing and suggestion of rehearing en banc is pending.

5. ***Boisvert v. FMC Corp.***, No. C-86-20613 (N.D. Calif), 1987 U.S. Dist. LEXIS 13549 (September 8, 1987). The *qui tam* relator alleged that FMC submitted false claims in connection with the production of the Bradley Fighting Vehicle. The relator filed his case on September 9, 1986. The district court held in 1987 that the 1986 Amendments should not be applied and that the Government-knowledge defense of the pre-1986 Act applied to the case. In 1987, the United States filed an *amicus* brief in that case advocating that the 1986 Amendments' *qui tam* provisions should not be applied retroactively. 1987 U.S. Dist. LEXIS 13549, at *2. The False Claims Act claims in that case are still pending in the district court.

6. ***United States ex rel. Newsham v. Lockheed Missiles and Space Company, Inc.***, No. C 88-20009 JW (N.D. Calif.), 1995 WL 241444 (April 20, 1995). The *qui tam* relator alleged that Lockheed engaged in false charging of labor hours to Government contracts between 1981 and 1984. She notified the Government of her allegations in 1984 and filed her *qui tam* action in 1988. The district court has held that the 1986 Amendments apply to these claims and twice has rejected Lockheed's arguments that the Government-knowledge defense bars these claims. This case is still pending before the district court.

7. ***United States ex rel. Peterson & Kroll v. Northrop Corporation***, No. CV 87-3698 KN (C.D. Calif.). This *qui tam* case was filed in 1987. The *qui tam* relator alleges defective pricing and mischarging in connection with the MX Peacekeeper missile program. The Government intervened in part of the case. The claims allege both pre-1986 and post-1986 Government-contractor conduct. In a September 2, 1994 order on Northrop's motion for partial summary judgment, the district court applied *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), and other decisions and held that some portions of the 1986 Amendments will be applied to Northrop's pre-1986 conduct, while others will not. The preponderance-of-the-evidence standard of the 1986 Amendments will apply, but the reduced scienter standard, no longer requiring specific intent and knowledge of the falsity, as well as the increased penalty provisions of the 1986 Amendments, will not apply.

8. ***United States v. TDC Management Corp.***, No. CIV A 89-1533 (D.D.C.). The Government filed this case under the Act alleging that TDC submitted false claims to the Urban Mass Transit Administration. The alleged false claims were submitted before 1986. The U.S. Court of Appeals for the District of Columbia Circuit held that the civil penalty and double damages provisions of the pre-1986 version of the Act, rather than the 1986 Amendments, govern this case because the 1986 Amendments "clearly expand the potential scope of liability under the Act." 24 F.3d 292, 298 (D.C. Cir. 1994). The court of appeals did not reach the Government's contentions about the retroactivity of the 1986 Amendments' scienter requirement. *Id.* The case is currently pending before the district court on remand from the D.C. Circuit.

9. ***United States v. Incorporated Village of Island Park***, 888 F.Supp. 419, 444 (E.D.N.Y. 1995). The Government brought this case under the Act based on claims submitted in 1984. The district court has held in an interim

ruling on motions for summary judgment that the 1986 Amendments should not be applied retroactively to these claims. The case is pending in the district court.

The foregoing cases demonstrate the various circumstances in which courts are still struggling with the question of whether the 1986 Amendments may apply retroactively. Furthermore, because the 1986 Amendments adopted a statute of limitations potentially as long as ten years after the violation is committed, 31 U.S.C. § 3731(b) (Supp. V 1987), future lawsuits presenting the retroactivity issue can still be filed. A decision in the instant case also will assist in such as-yet unfiled cases.

AIA and EIA believe that it is important for the Court to grant certiorari here to consider the issues raised by Northern Telecom's petition. The lower courts have reached inconsistent results and will continue to do so in pending cases, which are likely to take several years to resolve. Now is the appropriate time to address the retroactivity issue common among these cases, while also providing further clarification about retroactivity principles that will guide the lower courts in cases involving many other statutes.

CONCLUSION

AIA and EIA urge the Court to grant Northern Telecom's petition for a writ of certiorari.

October 25, 1995

Respectfully submitted,

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No. 95-471

IN THE

Supreme Court of the United States

October Term, 1995

NORTHERN TELECOM INC.,
a Delaware corporation,

Petitioner,.

v.

UNITED STATES OF AMERICA *EX REL.*
THEODORE R. ANDERSON,

Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Anderson does not oppose NTI's Petition for Writ of Certiorari. Simultaneous with the filing of this Response, Anderson is himself filing a Cross-Petition for Writ of Certiorari with respect to issues raised by the Ninth Circuit's dismissal of one of Anderson's claims. Anderson requests that the Court grant both NTI's Petition and Anderson's Cross-Petition. Nonetheless, this Response is submitted in compliance with Respondent's obligation under Supreme Court Rule 15 to address any perceived misstatements of fact or law set forth in the Petition which may have a bearing on the question of what issues would properly be before the Court if certiorari were granted.

Anderson does not agree with Petitioner's phrasing of the questions presented by this case. Petitioner's first question focuses on the retroactivity analysis set forth in *Landgraf v. USI Film Products* 114 S. Ct. 1483 (1994). In the case at bar the Ninth Circuit did not engage in "retroactivity" analysis or apply law "retroactively." Instead, the Ninth Circuit determined that the statutory amendment at issue was to be applied prospectively. Petitioner's second question implies that the Ninth Circuit's decision altered pre-existing substantive rights of the Petitioner. However, as the Court of Appeals noted the statutory amendment did not change the legal consequences of Northern Telecom's conduct:

> If Northern Telecom really did submit a fraudulent claim, it became liable and remained liable to the government and to potential *qui tam* relators. Congress changed the consequences of Mr. Anderson's conduct, not Northern Telecom's, in 1986.

Petitioner's App., p. 7a.

In its Reasons for Granting the Writ, Petitioner wrongly contends that the Ninth Circuit's decision in the case at bar is irreconcilable with the decision of the Sixth Circuit in *United States v. T.R.W., Inc.*, 4 F.3d 417 (6th Cir. 1993), *cert. denied*, 114 S. Ct.. 1370 (1994). The Ninth Circuit accurately distinguished *TRW*, stating:

> In *T.R.W.*, the relator disclosed the false claim before the 1986 amendment saved him from the jurisdictional bar, while in the present case, the relator did not make his disclosure until after the amendment expanded jurisdiction. In the case at bar we do not reach the question of whether the amendment applies retroactively.

> We assume without deciding that the amendment is prospective in its effect, as the Sixth Circuit held.

Petitioner's App., p. 7a.

Similarly, in attacking the distinction drawn by the Ninth Circuit between this case and *TRW*, Petitioner wrongly claims that the reasoning of the *Anderson* panel was "quickly abandoned by the Ninth Circuit in two subsequently decided cases, *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995), and *United States ex rel. Schumer v. Hughes Aircraft Co.*, [63 F.3d 1512] 1995 WL 502989 (9th Cir. Aug. 22, 1995)." Petition, p. 20.

In both *Lindenthal* and *Schumer*, the Ninth Circuit accurately laid out the factual distinctions which precluded following the reasoning set forth in *Anderson*. As stated in *Lindenthal*:

> The *Anderson* panel . . . avoided the key inquiry under *Landgraff* because application of the new law to the case at hand did not constitute application of conduct that had occurred prior to 1986. In this case, by contrast, the government did have the information forming the basis of the claim prior to the enactment of

> the amendments, and there is no relevant post-amendment conduct that might allow us to say our application of the new law is prospective only. We therefore cannot avoid deciding whether the new provision is 'retroactive' simply by focusing on an event such as disclosure that occurred after the amendments. Instead, we directly face the question whether Section 3730(e)(4)(A) should apply retrospectively.

61 F.3d at 1408. Similarly, in *Schumer*, the Court of Appeals explained:

> Because the government allegedly became aware of the allegations through the 1986 government audit, which pre-dated the 1986 amendments, this case differs from the *United States ex rel. Anderson vs. Northern Telecom, Inc.*, 52 F.3d 810, 814 (9th Cir. 1995), in which we declined to consider the retroactivity of the jurisdictional bar because the relator's disclosure to the government occurred after 1986.

63 F.3d at 1517, fn. 1.

While Respondent has further disagreement with the argument and the rhetoric contained in the Petitioner's Writ, these disagreements are more appropriately reserved for the briefs on the merits should the Writ be granted.

October 25, 1995

Respectfully submitted,

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